NOVA SCOTIA COURT OF APPEAL

Citation: *CHC Helicopters International Inc. v. Jessen*, 2006 NSCA 81

Date: 20060711
Docket: CA 250947
Registry: Halifax

Between:

CHC Helicopters International Inc.

Appellant

v.

Wendy Jessen

Respondent

Judges: Saunders, Freeman and Oland, JJ.A.

Appeal Heard: March 22, 2006, in Halifax, Nova Scotia

Held: Appeal and cross-appeal allowed with costs per reasons for judgment of Oland, J.A.; Freeman and Saunders, JJ.A. concurring.

Counsel: Thomas A. Groves, for the appellant
Brian J. Hebert and John Boddie, articled clerk, for the respondent

Reasons for judgment:

[1] The respondent, Wendy Jessen, had worked for the appellant, CHC Helicopters International Inc., for some two and a half years when she was dismissed without cause. Her claim for damages for wrongful dismissal, including damages in lieu of notice and general damages, was heard by Justice Glen G. McDougall with a jury, the trial spanning seven days in June 2005. The jury awarded Ms. Jessen four months' pay in lieu of notice, together with an additional 48 months' extended notice due to the manner of dismissal. It also determined that she was entitled to certain other amounts for items such as vacation pay and overtime pay.

[2] CHC Helicopters appeals the jury decision in regard to the 48 months' extended notice and Ms. Jessen cross-appeals. For the reasons which follow, I would allow both the appeal and the cross-appeal.

Facts

[3] CHC Helicopters, an international company supplying helicopter services, has a base at the Halifax International Airport. Ms. Jessen had worked in the helicopter industry before, having been employed by a predecessor of CHC Helicopters in Vancouver. She started working on a contract basis with CHC Helicopters at the Halifax base in August 1998, performing basic accounting services and helping out with whatever was needed. That October, she became its full-time flight co-ordinator. In April 1999, Ms. Jessen was made the Halifax assistant base manager. Her immediate supervisor was the Halifax base manager, Rod Legassick. Ms. Jessen performed many of his functions and when he was absent, she served as the acting base manager. By all accounts, Ms. Jessen was a hard worker.

[4] In July 2000 Ms. Jessen returned from a vacation to discover that her position as assistant base manager was being advertised. She had had no advance notice of this. The posting specified that the candidate must be a pilot, which Ms. Jessen was not. In August 2000 the president of CHC Helicopters announced that Ms. Jessen would be contracts manager, a newly created position. The next day Ms. Jessen was told that the company had decided the Halifax base did not need a contracts manager. The base manager told her to keep doing what she had been

doing, and that there would be something for her down the road. Ms. Jessen continued, but without a title.

[5] In February 2001 Ms. Jessen travelled to Vancouver with her husband, who also worked for CHC and who was being transferred there. Her uncontradicted testimony was that during a private meeting, the president of CHC Helicopters asked how things were going at the Halifax base, to which Ms. Jessen responded that basically everything was going well, but that there had been comments from its customers that "there was a lack of competency and leadership" at the Halifax base. After her return, the Halifax base manager was told by the president of that conversation. He advised Ms. Jessen that he didn't think he could trust her anymore, that he couldn't work with her, and dismissed her. Ms. Jessen called the president who told her not to worry, that everything would be fine, and that she would get her a letter of reference. After writing a note to staff, Ms. Jessen left the workplace.

[6] CHC Helicopters terminated Ms. Jessen's employment on February 8, 2001, approximately two and a half years after its commencement. The termination was conducted in private and CHC did not require her to leave the premises immediately.

[7] Within three working days of her dismissal, CHC hired a replacement for Ms. Jessen. That person commenced work very shortly thereafter. According to the base manager, he was unaware that a replacement had already been arranged when Ms. Jessen was let go.

[8] In its letter confirming the termination of her employment, CHC Helicopters offered Ms. Jessen over two and a half months' pay in lieu of notice. It did not – and does not – take the position that its reason for terminating Ms. Jessen constituted "just cause" for termination. CHC Helicopters failed to provide a record of employment within five days as statutorily required. That was not mailed to her until two and a half months after her dismissal, which delayed Ms. Jessen's claim for benefits. Nor did CHC Helicopters provide her with a letter of reference.

[9] Ms. Jessen subsequently moved to Vancouver. Although she had done some contract work, she still had not found full-time work by June 2005 when the

trial was heard. Ms. Jessen had made very strenuous efforts to find employment. CHC Helicopters withdrew its failure to mitigate defence.

[10] The jury awarded four months' pay in lieu of notice as reasonable notice. It extended the reasonable notice period by a further 48 months based on CHC Helicopter's breach of its duty of good faith and fair dealing. Based on the agreed annual salary of Ms. Jessen, this extension amounted to $170,880. Following judgment, the trial judge ruled that damages otherwise due for pay in lieu of notice during that extended period must be reduced by the amount Ms. Jessen earned during that time.

[11] CHC Helicopters appeals the award of extended notice, and Ms. Jessen cross-appeals the decision reducing her earnings by that amount.

Issues

[12] On this appeal and cross-appeal then, there are two issues:

> (a) whether the 48 month extended notice period awarded by the jury is a palpable and overriding error or wholly out of all proportion to that which ought to have been given as compensation for Ms. Jessen's damages; and
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> (b) whether the trial judge erred in law in finding that the damages flowing from that extended notice period must be reduced by the amount earned during that period.

Standard of Review

[13] Determining the test for appellate review of the jury's award requires consideration of the nature of its decision. Deciding what period constitutes reasonable notice of termination has been described both as a question of fact, and as an assessment of damages. It was seen as a question of fact in, for example, *McDonald v. Swift Canadian Co. Ltd.*, (1935), 9 M.P.R. 530 (N.S.S.C. *In Banco*); *Savard v. Urban Consultants Ltd.,* [1990] N.S.J. No. 115 (N.S.C.A.) at ¶ 5 and *Dockrill v. Walwyn Stodgell Cochrane Murray Limited*, [1983] N.S.J. No. 558 (S.C.T.D.) at ¶ 44. The standard of review applicable to factual conclusions made by the finder of fact is palpable and overriding error: *Housen v. Nikolaisen*, [2002]

2 S.C.R. 235 at ¶ 10. A finding of fact is not to be interfered with unless an error can be plainly identified and that error is shown to have affected the result: *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at ¶ 55 and 56.

[14] If, however, the determination of what constitutes reasonable notice is an assessment of damages, then the test for reviewing the jury's award was that laid out in *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at ¶ 161 and 162. The test then is "whether the verdict is so exorbitant or so grossly out of proportion . . . as to shock the court's conscience and sense of justice."

[15] Similar wording has been used by this court in determining whether damages awarded by a jury should be varied or set aside. See, for example, *Morrisscey v. Wicker,* [2001] N.S.J. No. 126 (C.A.) at ¶ 8 "wholly out of all proportion;" *Smith v. Stubbert,* [1992] N.S.J. No. 532 (C.A.) at p. 5 "wholly erroneous estimate of the damages;" and *Michalak v. Governors of Dalhousie College and University* (1983), 61 N.S.R. (2d) 374 (C.A.) at ¶ 25.

[16] In the recent case of *Young v. Bella*, [2006] S.C.C. 3, the Supreme Court of Canada considered a jury award made pursuant to the plaintiff's claim in negligence. It stated:

> ¶ 64 . . . Damage assessments are questions of fact for the jury. Jury awards of damages may only be set aside for palpable and overriding error. It is a long-held principle that "when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone": *Nance v. British Columbia Electric Railway Co.*, [1951] 3 D.L.R. 705, [1951] A.C. 601 p (P.C.), at p. 614. On this test, we cannot conclude that the award for non-pecuniary damages should be set aside. In light of the evidence, the jury's award cannot be said to be wholly disproportionate or shockingly unreasonable.
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> ¶ 66 We leave open for consideration in another case (where the policy considerations supporting a cap are more fully developed in evidence and argument) the issue of whether and in what circumstances the cap applies to non-pecuniary damage awards outside the catastrophic personal injury context.

> While the damages are higher than we would have awarded in the circumstances, the law assigns the task of that assessment to the jury. Given our conclusion that the cap does not apply in this case, the principle enunciated in *Hill* that an appellate court should not interfere with a jury assessment of non-pecuniary damages unless it "shocks the conscience of the court" (para. 163) precludes reduction of the award for non-pecuniary damages in this case. (Emphasis added)

[17] *Young v. Bella*, supra, speaks of reviewing a jury award on the "palpable and overriding" test and on the "shock the conscience" test. The Supreme Court of Canada seems to be using the tests interchangeably. In either event, it is apparent that a high degree of deference is owed to the jury on both findings of fact and assessments of damages. If the 48 month reasonable notice award in this case is either an erroneous determination of fact that was palpable and overriding, or an assessment of damages that shocks the conscience of the court, then the appellant is entitled to succeed on its appeal.

Analysis

(a) The Appeal

[18] In *Wallace v. United Grain Growers Limited*, [1997] 3 S.C.R. 701, the Supreme Court of Canada determined that particular acts of bad faith in the manner of dismissal can contribute to an extension of the notice period:

> ¶ 95 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 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.
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> . . .
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> ¶ 98 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. . . .

. . .

> ¶ 103 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, embarassment 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. [Emphasis added]

[19] The award of a further 48 months' notice was made by a jury. In order to ascertain whether a jury award is a palpable and overriding error or wholly out of all proportion such as to warrant appellate intervention, this court conducts a review of comparable cases. This approach was described in *Smith v. Stubbert*, supra, at p. 9 thus:

> In this case, the jury did not have the benefit of a review of the case law or even a statement as to a range of awards in like cases. A trial judge in the same position would have had these advantages. Nevertheless, where, as here, the jury award is so far out of line with awards in similar cases, we are compelled to intervene. . . .

and *Michalak v. Governors of Dalhousie College and University*, supra, at ¶ 26.

[20] In their facta, both parties referred to an article written by Gavin Hume, Q.C. and David Wong entitled "Wallace Damages: What Constitutes Bad Faith?"Annual CBA National Administrative Law and Labour/Employment CLE Conference, Ottawa, November, 2005 [unpublished]. The Hume article summarized 99 cases from across Canada up to June 2005, in which *Wallace* damages were awarded. Some of those decisions did not differentiate between the reasonable notice period and such damages. Of the 73 cases in which an amount of notice was explicitly awarded as *Wallace* damages, the average extension to the reasonable notice period was 3.4 months. None of the cases exceeded 12 months *Wallace* damages.

[21] *Wallace* damages are not subject to any cap or maximum amount. However, the Supreme Court of Canada in *Wallace,* supra, stated at ¶ 109 that a global notice award [i.e. both reasonable notice and *Wallace* damages] of 24 months' salary in lieu of notice is at "the high end of the scale." This court reviewed that guideline in *Silvester v. Lloyd's Register of North America Inc*., [2004] N.S.J. No. 37. At ¶ 28, Bateman J.A. wrote:

> . . . I would accept the Judge's conclusion that the collection of factors here, including the bad faith, puts this at the high end of the range. I am respectfully of the view that the notice period, at 30 months, is materially outside the acceptable range. While 24 months does not represent the absolute maximum notice period beyond which a court may not go, a period of notice above that "high end" of the range must be justified on the facts.

[22] Accordingly, it is necessary to consider what the jury may have taken into account in this case which would take the award of *Wallace* damages beyond the 12 month apex identified in the cases set out in the Hume article and beyond "the high end of the scale" of 24 months described in *Wallace*, supra, itself.

[23] In his address to the jury, the trial judge pointed out two matters: CHC Helicopters' delay in providing a record of employment, and its failure or refusal to provide a letter of reference. The courts have not considered these two forms of bad faith conduct of themselves as particularly egregious. For example, in *Schmidt v. AMEC Earth & Environment Ltd.*, [2004] B.C.J. No. 1571 (S.C.), the employer failed to provide a requested and promised letter of reference. The plaintiff was awarded one month for *Wallace* damages.

[24] Usually the lack of a reference letter or a delayed record of employment is found in combination with other factors supporting a claim for *Wallace* damages. Even then, the periods of notice have not approached the award of 48 months that was made here. For example:

> (a) In *Schimp v RCR Catering Ltd.*, [2004] N.S.J. No. 57 (C.A.), the employer made unsubstantiated accusations of theft, removed the plaintiff from the premises in view of other employees, and banned him from the premises for six months. No letter of recommendation was provided. *Wallace* damages: three and a half months.

(b) In *McCulloch v. IPlatform Inc*., [2004] O.J. No. 5237 (S.C.J.), the employer maintained just cause allegations throughout the trial, and failed to provide insurance claims forms and a letter of reference. It tried to hide the true identity of the company and claimed the employer no longer existed. *Wallace* damages: three months.

(c) In *Chabot v. William Roper Hull Child and Family Services*, [2003] A.J. No. 82 (Q.B.), the plaintiff was misled about the purpose of the meeting in which she was dismissed, and by a personnel manual which suggested that there would be no dismissal without warning. The employer refused to pay reasonable notice unless she signed a release, and did not provide a reference letter. *Wallace* damages: three months.

(d) In *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813 (C.A.), management told the employee that her dismissal was the result of restructuring, but then pleaded cause in its statement of defence. It maintained allegations of insubordination, inability to work with subordinates or to be a team player, and general unprofessionalism for two years until just before trial. The employer refused to pay commissions owed to her and delayed sending her record of employment. *Wallace* damages: three months.

[25] Ms. Jessen urges that the jury's award for *Wallace* damages was not founded only on the delayed record of employment and lack of a reference letter which were noted by the trial judge in his jury charge. According to the respondent, a review of the evidence shows that it was open to the jury to find that CHC Helicopters' behaviour included various acts which have been found to be a breach of the duty of good faith and fair dealing. She argues there was evidence of unfounded allegations, insensitivity as to her personal circumstances, her being misled as to the reasons for her termination, active intent to hurt her, failure to hear her out, no warning, not paying amounts due for vacation pay, and broken promises. Ms. Jessen also referred to her diagnosis with an adjustment reaction disorder and the stigma attached to her dismissal.

[26] In my view, the arguments raised by Ms. Jessen do not establish that the manner of her dismissal was exceptionally egregious. For example, there was no

public humiliation, such as an accusation of theft or fraud or being escorted out of the premises.

[27] Ms. Jessen submits that she had been given assurances of job security from the time her position as assistant base manager was posted, and that she had absolutely no reason to believe that her job was in jeopardy. She says that she was not given an adequate opportunity to have her position heard before her employment was terminated. She points to the arrangement of a replacement for her within three working days of her dismissal, and an earlier reassignment of her safety officer duties, as evidence giving rise to the inference that she had been misled as to the true reasons for her dismissal. In addition, the respondent argues that unfounded allegations were made to a customer, and during the course of the litigation, regarding her ability to act as assistant manager and to be a team player.

[28] While she claims that CHC Helicopters made active attempts to hurt her, the evidence before the jury amounts to this. The base manager denied that anyone had been instructed not to give references to Ms. Jessen. Those pilots and engineers on the base whom she asked to supply references did not do so. When one of the pilots approached the base manager about her request, he was told to consult with upper management. There was no evidence whether or not the pilot did so. There was no evidence of active interference by the appellant with Ms. Jessen's attempts to find employment for example, by speaking badly of her to prospective employees.

[29] The respondent submits that the appellant was insensitive to her personal circumstances, because she and her husband were in the process of separating at the time of her dismissal. However, this she had not made public. All the base manager knew was that Ms, Jessen had decided not to relocate to Vancouver with him.

[30] As for the diagnosis of adjustment reaction disorder, this was attributable only in part to the loss of her job. Similarly, the stigma attached to her being dismissed was attributable to the loss of her job. Neither resulted from CHC Helicopters' treatment of her in the course of dismissal, which is the basis of *Wallace* damages.

[31] These factors, either individually or cumulatively, and in combination with the lack of a reference letter and the delayed record of employment, do not, in my view, amount to exceptional circumstances that would warrant an extended period of notice in the magnitude of 48 months. Even if I were to assume that all the inferences from the evidence made by the jury favoured the respondent, there remains a very significant disparity between the jury award here and in other cases on extended notice. Ms. Jessen's employment with CHC Helicopters lasted some two and a half years. The jury was not given any information as to a range of awards. It determined that an appropriate award for reasonable notice was four months, and added an award of 48 months, equivalent to four years, as the extended period of notice. Forty-eight months is the highest award of *Wallace* damages to be found in the existing case law. Nothing in the jurisprudence approaches its magnitude. The facts of this case are not in any way extreme. In my view, they are certainly not extreme enough to justify the massive discrepancy between the amount of the jury award and the awards of *Wallace* damages in other decided cases.

[32] The respondent argues that a comparison of the award here with others is not particularly helpful nor appropriate. According to *Wallace,* supra, at ¶105, the injuries compensated for in a breach of an employer's duty of good faith and fair treatment are analogous to the injuries compensated for in defamation claims. In *Hill v. Church of Scientology of Toronto*, supra, at ¶167 et seq, the Supreme Court of Canada found that general damages in defamation cases were "at large" and within the peculiar province of the jury. At ¶ 190, it described each libel case as unique and suggested that little is to be gained from a detailed comparison of libel awards.

[33] Ms. Jessen also stressed that there is no cap on *Wallace* damages and that this was a jury award. In *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 the Supreme Court of Canada upheld $1,000,000. in punitive damages awarded by a jury against an insurer which steadfastly refused to pay a claim under a fire insurance policy. The insurer alleged arson, even though experts (including its own initial expert) said there was no evidence of arson. It eventually conceded in the courts that that allegation was without any air of reality. In the course of its decision, the Supreme Court stated:

> ¶ 136 The respondent objects that, prior to this judgment, the highest previous award in an insurer bad faith case was $50,000. However, prior to the $800,000

> award of punitive damages upheld in *Hill, supra*, the highest award in punitive damages in a libel case in Canada was $50,000: *Westbank Band of Indians v. Tomat*, [1989] B.C.J. No. 1638 (B.C.S.C.). One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities. (Emphasis added)

[34] In *Young v. Bella*, supra, a jury awarded non-pecuniary damages, pursuant to a claim of negligence, against the res`pondent professor, director and university. The decision of the Supreme Court of Canada stated:

> ¶ 63 The respondents argue that the assessment of $430,000 for non-pecuniary damages must be set aside because the loss suffered by the appellant is not of such magnitude to justify "one of the largest non-pecuniary general damage awards . . . ever awarded in this country and it is therefore appropriate for this Court to exercise its discretion in adjusting same".
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> ¶ 64 This is not the test for appellate interference with a jury award. As mentioned earlier, the appellant called expert evidence (which was uncontradicted), laying out a number of scenarios based on different potential findings of fact for the jury's consideration. Damage assessments are questions of fact for the jury. Jury awards of damages may only be set aside for palpable and overriding error. It is a long-held principle that "when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone": *Nance v. British Columbia Electric Railway Co.*, [1951] 3 D.L.R. 705, [1951] A.C. 601 p (P.C.), at p. 614. On this test, we cannot conclude that the award for non-pecuniary damages should be set aside. In light of the evidence, the jury's award cannot be said to be wholly disproportionate or shockingly unreasonable.

[35] The jury awards which were ultimately upheld in each of *Hill, Whiten* and *Young*, supra, were indeed substantially higher than any awarded previously for those types of cases. However, the fact that the award was determined by a jury does not make it immune from review. Rather, the question is whether, on the facts of the individual case, the award met the test set out for appellate review for that type of litigation.

[36] As indicated earlier in this decision, that a jury is entitled to very considerable deference on both findings of fact and assessment of damages is without question. In my view, the magnitude of the 48 month extended notice

award simply cannot be justified on the particular facts of this case which are neither strikingly egregious nor particularly exceptional. That assessment of damages in those circumstances constitutes an erroneous determination of fact that is palpable and overriding, and shocks the conscience of the court. I would allow the appeal.

(b) The Cross-Appeal

[37] The parties having been unable to agree whether mitigation by Ms. Jessen should apply not only to the reasonable notice period but also to the extended notice period, Justice McDougall received written briefs and then heard oral submissions. In his decision dated September 8, 2005, he concluded:

> ¶ 10 Any extension to the period of reasonable notice arising out of the bad faith conduct of the employer at the time of dismissal is not a separate head of damages that would be subject to new or different rules regarding mitigation. As such, the plaintiff is required to mitigate her damages throughout the period of reasonable notice which should include the additional notice period awarded by the jury.

[38] Ms. Jessen cross-appeals, alleging that the trial judge erred in law. Relying on *Y.S. v. H & R Property Management Ltd.*, [1999] O.J. No. 5588 (Sup Ct. J.), CHC Helicopters maintains that Wallace damages are subject to reduction where a former employee mitigates her losses by finding another job. See also *Boule v. Ericatel Ltd.*, [1998] B.C.J. No. 1353 (S.C.) at ¶ 44 and 45; *Frank v. Federated Co-operatives Ltd.*, [1998] A.J. No. 12 (Q.B.); and *Musgrave v. Levesques Securities Inc.*, [2000] N.S.J. No. 109 (S.C.).

[39] All of these cases predate *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.). The trial judge had allowed the action for wrongful dismissal and, among other things, held that the employee was entitled to 18 months' reasonable notice and to punitive damages. In disposing of the appeal, Weiler, J.A. commented on *Wallace* and mitigation of damages. After stating that the findings of the trial judge supported the conclusion that the manner of dismissal had been humiliating and damaging to the self-esteem of a long term employee who would, accordingly, be entitled to compensation by way of an extended notice period, she continued with regard to *Wallace*:

> ¶ 69 . . . As Iacobucci J. elaborated at para. 104:

> Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable. (Emphasis added)
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> . . .
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> ¶ 71 The issue of mitigation of damages did not arise in *Wallace*. Ordinary damages for wrongful dismissal are subject to a duty to mitigate on the part of the employee. The amounts earned in mitigation are deducted from the amount of damages awarded to an employee in lieu of notice.
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> ¶ 72 Prinzo fulfilled her duty to mitigate by finding alternative employment. Her new employment paid somewhat less than her previous employment. Baycrest only has to make up the difference between her salary level at Baycrest and what she was earning at Allstate during the ordinary notice period. If this deduction of earned income were also made from the damages awarded in relation to a "*Wallace* extension", Prinzo would not effectively be compensated for the injury done to her. This result would appear incongruent with the Supreme Court's view in *Wallace* that the injuries resulting from bad faith conduct on the part of the employer are "sufficient to merit compensation in and of themselves" irrespective of whether the bad faith conduct affects employment prospects. On the basis that intangible injuries cannot normally and completely be mitigated by finding other employment, it has been suggested that the extended notice period be treated as akin to a severance payment which is not subject to mitigation. This issue was not, however, argued before us, and having regard to my earlier conclusion upholding the trial judge, I need not resolve it. (Emphasis added)

[40] While the last sentence of ¶ 72 makes it clear that these statements are *obiter*, this suggestion in *Prinzo*, supra, has been followed in Ontario. See, for example, *McCulloch*, supra; *Bouma v. Flex-N-Gate Canada Co.*, [2005] O.J. No. 1307 (Sup. Ct. J.); and *Carscallen v. FRI Corp.*, [2005] O.J. No. 2400 (Sup. Ct. J.).

[41] I am conscious that breach of the obligation of good faith and fair dealing in the matter of dismissal is to be compensated by adding to the length of the notice period: *Wallace* at ¶ 95. Consequently, an argument can be made that the negotiation ought to apply to the *Wallace* damages just as it does to the reasonable notice period. However, for the reasons set out in *Prinzo*, I am of the view that reducing an award of *Wallace* damages by the amount of earned income does not accord with the Supreme Court of Canada's view in *Wallace* that an employee should be compensated for bad faith conduct. I would allow the cross-appeal.

Disposition

[42] The parties take different positions as to what this court should do were the appeal allowed. The dismissal took place in 2001. The trial before judge and jury in 2005 lasted seven days. This court was informed that all the witnesses are now in British Columbia. CHC Helicopters submits that little depended on credibility, and that this court has the authority to determine the appropriate period of extended notice. Alternatively, it suggests that the matter could be referred back to the trial judge who heard all the witnesses and can assess credibility as needed. Ms. Jessen argues that she is entitled to a new trial before a jury. She adds that if this court were to quantify the extended notice, given the jury's finding, any reduction of the extended notice period ought not to be large.

[43] The *Judicature Act*, R.S.N.S. 1989, c. 240 provides:

> **Appeal to Court of Appeal**
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> 38 (1) Except where it is otherwise provided by any enactment, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court or a judge thereof, whether in court or in chambers.
>
> (1A) Notwithstanding any enactment but subject to Sections 39 and 40, an appeal lies to the Court of Appeal from any decision, verdict, judgment or order of the Supreme Court (Family Division) or a judge thereof.
>
> (2) The Court of Appeal also has jurisdiction as provided by any Act of the Parliament of Canada or of the Legislature.

> (3) If, upon the hearing of any appeal, it appears to the Court of Appeal that a new trial should be ordered, it may order that the decision, verdict, judgment or order be set aside and that a new trial be held subject to such terms and conditions as the Court of Appeal may direct.
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> (4) Nothing in this Section restricts the jurisdiction and power of the Court of Appeal exercised by the Appeal Division of the Supreme Court before the first day of March, 1972. (Emphasis added)

[44] Also relevant is *Civil Procedure Rule* 62.23(1) which provides:

> **Powers of the Court**
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> 62.23.
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> (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court by the **Judicature Act** or any other enactment the Court may:
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> > (a) amend, set aside or discharge any judgment appealed from except one made in the exercise of such discretion as belongs to a judge;
> >
> > (b) draw inferences of fact and give any judgment, allow any amendment, or make any order which might have been made by the court appealed from or which the appeal may require;
> >
> > (c) make such order as to the costs of the trial or appeal as it deems fit;
> >
> > (d) direct a new trial by jury or otherwise, and for that purpose order that the judgment appealed from be set aside;
> >
> > (e) make any order or give any judgment which the appeal may require. (Emphasis added)

[45] These broad powers make it clear that the court could remit the matter back for a new jury trial. It also could vary the jury award by substituting its own award

(see: *Smith v. Stubbart,* supra, at p. 9; *Michalek v. Governors of Dalhousie College and University*, supra, at p. 26).

[46] The appellant's argument that the matter could be referred back to the trial judge, who had heard all the evidence on whom the jury based its decision, is founded on *Johnson v. Laing*, [2004] B.C.J. No. 1313 (CA), leave to appeal refused [2005] S.C.C.A. No. 91. In allowing the appeal in that case, and sending the assessment of pecuniary and non-pecuniary back to the trial judge alone. Southin, J.A., for the court relied on the broad powers of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(1). That provision reads:

> **Powers of Court of Appeal**
>
> 9(1) On an appeal, the court may
>
> (a) make or give any order that could have been made or given by the court or tribunal appealed from,
>
> (b) impose reasonable terms and conditions in an order, and
>
> (c) make or give any additional order that it considers just.

[47] Justice Southin wrote:

> ¶ 157 I have concluded, although not without some hesitation, that s. 9(1)(c) does empower this Court to remit a cause to the trial judge to assess the damages on the evidence at the trial before him in circumstances such as these, and that, in this case, the Court should do so. The learned trial judge has the great advantage of having seen the witnesses, especially the appellant.
>
> ¶ 158 Important though the right of trial by jury in civil cases is thought to be, the Court must be mindful not only of the cost of a new trial by jury but also both of the inconvenience to the witnesses, both expert and lay, and the reproach the administration of justice rightly suffers from delays its procedures inflict on litigants. It is now some seven years since the accident and five years since this action was brought and the sooner it is ended the better.
>
> ¶ 159 I would therefore allow the appeal accordingly. . . .

[48] However, in *Fast v. Moss,* 2005 B.C.C.A. 571, the same court refused a reconsideration of the jury's damage award by the trial judge alone. Lowry, J.A. writing for the court noted that in *Johnson v. Laing*, supra, Southin, J.A. had concluded that the court had the jurisdiction to order that the trial judge assess the damages and, because of the pragmatic considerations in that case, should do so.

[49] He continued:

> ¶ 15 In my respectful view, however, the unusual disposition of the appeal from an unreasonable jury verdict in that case, that was seen to be dictated by the circumstances, should not be seen as a determination that this Court should no longer order that an action be retried where a jury's verdict on an assessment of damages cannot stand. Much of the importance that has long been attached to litigants being entitled to have a jury adjudicate their dispute, if they wish, would be lost.
>
> ¶ 16 There is no doubt much [is] to be said for the pragmatic approach this Court took in the circumstances of the Johnson case. The cost of litigation and the time required to retry cases of this kind are certainly of great consequence, but the right to a jury's assessment cannot be lightly compromised in favour of expediency. As long as there continues to be a legal right to have a jury empanelled in civil cases in this province, the consequences of unsupportable verdicts must continue to be accepted. Generally, a litigant who wishes to exercise that right should not lose it simply because the jury empanelled renders a verdict that is not legally supportable. It cannot be a matter of a litigant having only one kick at the can so to speak before having to accept an assessment made by a judge.

The court ordered a new trial.

[50] The circumstances of this particular case coupled with the position taken by the respondent's counsel at the hearing before us are such, that in my view, this court should determine the appropriate period of extended notice. As set out in ¶ 43-45 above, it is undisputed that we have the authority to do so. At trial, the respondent successfully established her claim; unfortunately, the jury awarded an amount for extended notice which is unsupportable in law. Pragmatic factors such as those identified in *Johnson*, supra, are relevant here. The appellant's employment was terminated in early 2001, over five years ago. More time would have to elapse before a new trial could be heard. The original trial took seven days. All the witnesses now reside outside this province – they would be called upon to testify again. It is apparent that the delays and the costs associated with a

new trial would be significant. All this simply to establish the length of the period for extended notice. I note as well that counsel for Ms. Jessen only objected to having this case sent back to the judge who presided at the trial, for the required assessment. He did not oppose having the matter resolved once and for all by this court.

[51] I would allow the appeal, and would order the appellant to pay the respondent as pay in lieu of notice for the extended notice period, an amount equal to nine months' pay less applicable statutory deductions. Costs on the appeal equivalent to 40% of the costs at trial, together with disbursements as agreed or taxed, are to be paid by the respondent to the appellant. I would allow the cross-appeal. Costs on the cross-appeal of $1,000. plus disbursements as agreed or taxed are to be paid by the appellant to the respondent

Oland, J.A.

Concurred in:

Freeman, J.A.

Saunders, J.A.