IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Wilmot v. Ulnooweg Development Group Inc., 2006 NSSC 299

Date: 20060706
Docket: ST 228942
Registry: Truro

Between:

Terry Ann Wilmot

Plaintiff

v.

Ulnooweg Development Group Incorporated

Defendant

DECISION

Judge:	The Honourable Justice John D. Murphy
Heard:	June 12, 13, 16, 2006 in Truro and Halifax, Nova Scotia
Written Decision:	October 6, 2006 - *(Oral decision rendered July 6, 2006)* Editing in written decision limited to improving or correcting grammar, providing citations for authorities referred to, and inserting quotations which were referenced but not read during oral delivery.
Counsel:	Robert H. Pineo, for the Plaintiff Colin D. Bryson, for the Defendant

By the Court:

[1] We are here today for decision in the matter of Wilmot and Ulnooweg Development, File #228942. The usual qualification applies - although I am delivering this orally and I haven't prepared written reasons - I reserve the right to do so. I don't plan to do that unless for some reason it is necessary. If I do, I reserve the right to edit, amplify, and reorganize what I say today by referring to some more facts and some more law; in particular, I'll state the facts in detail because I am not going to do that today. I reserve the right to make those changes without, of course, affecting the end result in any way.

[2] I am going to summarize the facts by referring to the parties' comprehensive pre-trial briefs. It is not necessary for me to read into the record today a recitation of the facts. In their written submissions the Plaintiff and Defendant have outlined the facts, many of which are not seriously disputed, and have identified those in issue.

NOTE:

When delivering judgment orally, I did not read the relevant extracts from the parties' briefs, but referred to them by paragraph and/or page number, and identified editorial changes, inserts and deletions to reflect my findings based upon the evidence at trial. The extracts which I referred to are reprinted in the following quotations, with the edits I noted orally indicated by using *italics* to identify changes or additions to the wording of the briefs, and by inserting "[...deletion...]" to show where words have been removed.

[3] From "STATEMENT OF FACTS" in Plaintiff's brief:

> **The Action and the Parties**
>
> 1. The Plaintiff, Terry Ann Wilmot, brings action S.T.No. 228942 against the Defendant, Ulnooweg Development Group Inc. For the wrongful termination of her employment and for its commission of the tort of intentional infliction of emotional harm.
>
> **The Following Facts are Admitted by the Defendant**
>
> 2. That the Defendant employed the Plaintiff pursuant to an oral, common law contract of employment ("the Employment Contract").

3. That the Parties entered into the Employment Contract in October of 1991.

4. That by the year 2003, the Plaintiff's annual salary was $39,312.

5. That the Plaintiff earned vacation pay at a rate of 4% in addition to her salary.

6. That by the year 2003, the Plaintiff held the position of Administrative Assistant.

Anticipated Evidence

The Plaintiff anticipates that the evidence will establish the following facts:

7. That the Plaintiff is a 40 year old (38 year old at the time of the termination) Native Canadian woman who lives on the Millbrook First Nation Reserve, near Truro, Nova Scotia. The Plaintiff completed her grade 12 education later attended St. Mary's University for approximately half of a term in 1984. Due to health problems experienced at that time, she left of [sic] university and returned home to Millbrook. Also during the mid 1980's, the Plaintiff received some computer training.

8. That the Defendant terminated the Employment Contract on June 26, 2003.

"[...deletion...]"

10. That from the beginning of her employment with the Defendant, until the year 2002, the Plaintiff was considered an excellent employee: one who was conscientious and diligent; one who contributed significantly to the operations of the Defendant; and one who loved her job.

11. That the Plaintiff had never been disciplined for misconduct of any kind.

12. That on May 22, 2000, the Plaintiff's supervisor, mentour [sic] and close friend, Mr. John Bower, passed away unexpectedly from a heart attack. The Plaintiff grieved for her loss. "[deletion...]"

17. That from the period of May 2002 to June 2003, the Plaintiff was unable to work for significant periods of time due to her illnesses. In total, she missed 138 days, as follows:

- the entire month of May (22 days);
- the entire month of June (20 days);
- September 12, 13, 18, 19, 23;
- October 2, 4, 22;
- November 1, 14;
- December 3, 13, 13, [sic] 16, 18
- January 13, 17, 20, 22, 23, 24, 27, 28, 29, 30, 31;
- the entire month of February (20 days);
- the entire month of March (21 days);
- April 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 23;
- May 6, 9, 13, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30;
- June 2.

18. That Plaintiff's missed time at work did not cost the Defendant any money out-of-pocket: she used her vacation time, accumulated sick time, special leave time or took unpaid leaves of absence.

"[...deletion...]"

23. That on June 3, 2003, Mr. Hoskin provided a letter to the Plaintiff detailing following:

- that he had serious concerns about her health;
- that he *had serious concerns about* her ability to fulfil her employment duties;
- the days that she was absent from work (as set out in paragraph 16 [sic, should be *17*]);

- details of the conservation [sic] that they had on March 27, 2003 concerning how her sick leave was funded by using vacation, sick pay, special leave pay, Employment Insurance;

- that the Plaintiff told Mr. Hoskin that she was "ready and able" to work on April 14, 2003;

- that Mr. Hoskin was aware that *since* the Plaintiff's return to work on April 22, 2003, she still had "serious health issues";

- that the Plaintiff had to excuse herself from meetings and the work environment on several occasions;

- that the Defendant deducted three days pay from the Plaintiff for an overpayment previously made while she was off on sick leave;

- that on June 6, 2003 the Defendant would issue to the Plaintiff a Record of Employment so that she could qualify for 17 weeks of Employment Insurance and then for Long Term Disability Benefits from the Defendant's insurer (the Defendant did not have short Term Disability insurance);

- that the Plaintiff, due to her absenteeism "[...deletion...]" , was placing a financial drain on the Defendant and was placing "an unfair burden" on her co-workers;

- that if required, the Defendant *might* consider an extended period of unpaid leave to allow her to convalesce;

- *The final paragraph of the letter reads as follows:*

> "*We should meet to discuss the future of your employment with Ulnooweg as soon as possible. It is imperative that we discuss these issues soon, as Ulnooweg cannot retain you as an employee unless the current situation is remedied in the very near future. In your conversation with Chief Terrance Paul you said that you would be seeing your Doctor's [sic] again this week and that you would let us know your plans. I look forward to hearing back from you this week as you indicated.*"

24. The Plaintiff's family physician is Dr. Mary Feltmate. Dr. Feltmate produced a medical-legal report dated May 25, 2005 wherein she opines that the stresses of the Plaintiff's employment "contributed significantly: to the development of her "depression and panic symptoms in 2002";

That report, which was written approximately two years after the termination of the Plaintiff's employment, stated as follows:

> *"You have asked me to address 3 questions regarding Ms. Wilmot.*
>
> *1. I believe that the stresses of Ms. Wilmot's employment contributed significantly to the development of her depression and panic symptoms in 2002. In January of 2002 at our first meeting, she discussed the stress of her work. In May 2002 she stated that her work situation, especially the amount of work required of her, was continuing to be stressful. She was off work in May and June 2002, returning in mid July. She continued over the next year to report anxiety, panic, and exhaustion and eventually had to stop work again in June 2003.*
>
> *2. While Ms. Wilmot's termination was stressful, I believe her emotional difficulties were ongoing at the time, and would have been ongoing even without the termination.*
>
> *3. Currently Ms. Wilmot is still having significant difficulty with the activities she previously managed easily, including driving, shopping, caring for her home and herself, and leaving the house.*
>
> *She still experiences episodes of panic. There has been no significant improvement but she still is far from able to return to any regular employment. I do not anticipate Ms. Wilmot being able to return to work in the foreseeable future."*

25. The Plaintiff began to see Dr. Wendy Nickerson, Psychologist, in May of 2003*, the month prior to termination,* for her psychological difficulties. Dr. Nickerson produced a medical-legal report dated July 4, 2005 wherein she gave the following diagnoses:

- Major Depressive Disorder - recurrent;
- Panic Disorder with Agoraphobia;
- Post Traumatic Stress Disorder; and,
- R/O Dysthymic Disorder.

Dr. Nickerson went on to opine that the increase in the Plaintiff's workload following her superior's death "played a significant role" in her mental health difficulties. Additionally, she opines that the termination of the Plaintiff's employment "played a detrimental role in her mental health". Finally, she opines that had the Plaintiff been given a longer convalescence period, her prognosis would have been more positive.

26. That the Plaintiff has "[...deletion...]" suffered severe panic attacks; fear of leaving her home; mood swings; depression; she is unable to get her groceries, drive and manage her financial affairs; that she has to move in with her parents; and, is unable to be employed. These disabilities continue to the present time.

27 That the Plaintiff suffered no mental health difficulties that affected her work (or at all) prior to the death of Mr. Bower "[...deletion...]".

[4] The foregoing statements from the Plaintiff's brief, with the edits I have made, were supported by the evidence. The following statements of fact in the Defendant's brief, qualified as indicated, were also supported by the evidence.

From "**FACTS**" in Defendant's Brief:

Ulnooweg is a not for profit corporation that provides developmental lending and business advice to aboriginal businesses in Atlantic Canada. Its main office is in Truro, Nova Scotia, with satellite offices in New Brunswick and Newfoundland.

The Plaintiff, Terry Wilmot (D.O.B. May 3, 1965) worked for Ulnooweg in its Truro office from October 1991 until her employment was terminated on June 26, 2003. For the last several years of her employment, Ms. Wilmot worked as an

Administrative Assistant, with her salary at the time of her dismissal being $39,312.00 per year.

The number of people working at Ulnooweg's Truro office changed over time. In May 2000, the staff at Ulnooweg's Truro office consisted of a Director of Operations (John Bower), a General Manager (Bob MacGillvray), three Loans Officers (who reported to the General Manager), an Administrative Assistant (Terry Wilmot) and a receptionist, who had some administrative duties. In addition, there were two people working in the "Business Services" arm of Ulnooweg, which provided business help to clients. Ulnooweg also engaged the services of an outside certified general accountant on a one-day per month basis, to do a monthly check-up of the accounting system and to review transactions enter by staff.

As an Administrative Assistant, Ms. Wilmot reported to the Director of Operations, John Bower, and assisted Mr. Bower, the General Manager, the Loans Officers and the Business Service staff as an office support person, doing such tasks as filing, ordering office supplies, obtaining names or credit checks for loan applications, disbursing cheques, entering daily postings on the computer and providing information to the Loan Officers, General Manager, or the Director of Operations for their various reporting functions.

A change in Ulnooweg's structure and personnel was precipitated by the sudden death of John Bower (by heart-attack) in May of 2000. Mr. Bower's position was filled by Todd Hoskin (a certified management accountant) in February of 2001. In May, 2002, following a review of Ulnooweg's financial position initiated by Mr. Hoskin, the Business Services arm of Ulnooweg was discontinued (and its staff terminated) and the General Manager's position was eliminated, with Mr. MacGillivray retiring.

There is a dispute over the additional responsibilities given to or assumed by Ms. Wilmot following the death of Mr. Bower. Ms. Wilmot's position is that she assumed, and kept, many of the duties formerly performed by Mr. Bower, even after Mr. Hoskin was hired in February of 2001. Ulnooweg disagrees with this, stating that Ms. Wilmot's duties changed only slightly, and that Mr. Bower's duties were, for the most part, assumed by the General Manager, with assistance through an increased role for the external certified general accountant, and then by Mr. Hoskin when he started at Ulnooweg in February of 2001. In saying this, Ulnooweg does allow that there would have been a temporary period of disruption after the death of Mr. Bower, and that Ms. Wilmot would have provided help to Mr. MacGillivray and the Loan Officers in adjusting (in a business sense) to the loss of Mr. Bower.

While Ulnooweg's position is that Ms. Wilmot's duties were largely unchanged following Mr. Bower's death, it states that Mr. Bower's death did greatly affect Ms. Wilmot on a personal level. Ms. Wilmot was not the same person after Mr. Bower's untimely death, and quite possibly, never recovered from it.

Ms. Wilmot has been diagnosed with a major depressive disorder, a panic disorder with agoraphobia (fear of open or public places) and post traumatic stress disorder. This diagnosis, indeed that fact that Ms. Wilmot was suffering from a mental illness, was not disclosed by Ms. Wilmot to Ulnooweg until the disclosure required in this law suit. What was stated by Ms. Wilmot to Ulnooweg was that she was ill, with no other details provided. Further, on numerous occasions, Ms. Wilmot stated that she was better, only to quickly go off work again, or to leave work early or come in late.

From Ulnooweg's perspective, the fact of Ms. Wilmot's illness arose for the first time in the first few months of 2002, when she took several days off and left work early on several more. Starting in mid-May 2002, Ms. Wilmot was off work for four weeks based upon a note from her family doctor referring to "medical reasons". Ms. Wilmot explained to Mr. Hoskin that she would needed [sic] this time off for medical reasons. Mr. Hoskin told her to take that time that she required to get better. This time off was extended to July 15, 2002 by a further doctor's note. Ms. Wilmot came back to work in mid-July, 2002, on her own volition, stating that she was better.

During this time off, Ms. Wilmot continued to receive full salary because of a substantial amount of banked sick leave credits accumulated through her years at Ulnooweg.

Over the remainder of 2002, Ms. Wilmot took 19 more sick days, and left work early, or came in late, on several other occasions. For the 19 sick days, she told Mr. Hoskin that she was off due to health reasons and Mr. Hoskin again advised her to take the time off that she needed to get better. Ms. Wilmot did not advise Mr. Hoskin of the several other days that she had left work early. Mr. Hoskin found out about this from office staff. When Ms. Wilmot came back to work on these several occasions, she continued to state that she was better.

These health issues affected Ms. Wilmot's job performance, primarily because she was not there to do her job. This was reflected in her year-end performance review for 2002, which, while prepared in draft, was not specifically discussed with Ms. Wilmot, though Mr. Hoskin did discuss her declining performance standard with her.

Ms. Wilmot's absence from work also had an understandable negative effect on Ulnooweg, as work that had to be done, did not get done, was not done on time, or had to be done by others. "[...deletion...]"

Ms. Wilmot was off for health reasons for several days in December of 2002, and in early January 2003. While Ms. Wilmot continued to maintain that she did not need the time off, Mr. Hoskin was concerned, suspected that Ms. Wilmot was not seeking the appropriate medical help and wanted to discuss matters with her doctor. Thinking that he could not talk directly with her doctor, he met with Ms. Wilmot and provided her with a letter dated January 16, 2003. This letter set out his concerns about her health, and encouraged her to discuss her health issues with her doctor. Ms. Wilmot met with her doctor the following day and based upon a doctor's note stating "Off work due to medical illness for 2-3 months", was off work again. "[...deletion...]"

Ulnooweg could not continue to operate without somebody doing Ms. Wilmot's job, which, from its perspective, had not been done effectively since May 2002. So, in late January 2003, Ulnooweg advertised for the position of Finance Administrator, a new position which consisted of many of the duties in Ms. Wilmot's job description. Prior to the ad for the new job being placed, Mr. Hoskin called Ms. Wilmot to let her know, and to also tell her that she would have a job once she returned, that being the new position of a Loans Clerk, which he considered to be a lateral move. Ms. Wilmot stated that she was okay with this. This new person was hired and started work on March 10, 2003.

Ms. Wilmot's sick leave benefits were used up by the end of March 2003. Ulnooweg did not have a short-term disability plan, but did have a long-term disability plan through an independent insurer, which would commence paying benefits after Ms. Wilmot had used up the 17 weeks of disability Employment Insurance available to her. Mr. Hoskin met with Ms. Wilmot on March 27, 2003 to explain this and to explain that he would be issuing a Record of Employment so that Ms. Wilmot could claim Employment Insurance disability. Ms. Wilmot did not want to do this, stating that she would not go on E.I. and that she was "able and ready to work" as of April 14, 2003. She asked if she could take vacation or special leave (with pay) until then. Mr. Hoskin denied this request, but said she could return to work on April 14, emphasizing, however, that if she were to return to work, Ulnooweg wanted her there on a full-time basis, and not off and on, or leaving work early or coming in late. Ms. Wilmot then requested that she be able to take four vacation days as of April 14, to give her another week off. Mr. Hoskin agreed to this, even though Ms. Wilmot had not yet earned those vacation days.

Ms. Wilmot returned on April 22, only to take a vacation day on April 23, 2003. Over the next three weeks, she was absent without leave for three more days, and left work early on many of the other days. Again, throughout this time, Ms. Wilmot continued to maintain to Mr. Hoskin that she was better. Ms. Wilmot was completely absent without leave from May 15 to June 2, 2003, without advising Ulnooweg that she would be away, or why she was away. She was paid for some of this time on a "special leave", as a result of her speaking with the Chair of the Board of Ulnooweg, Chief Terrence [sic] Paul.

As a result of the above, Mr. Hoskin wrote Ms. Wilmot on June 3, 2003. The letter expressed concerns over Ms. Wilmot's health issues and stated that another Record of Employment (in addition to the one of March 28, 2003) would be issued, so that Ms. Wilmot could apply for Employment Insurance disability benefits. The letter also stated that it was imperative that Ms. Wilmot's attendance improve immediately, and that Ulnooweg would not be able to retain her as an employee if she could not work on a regular basis, but that if she required it, Ulnooweg might consider an extended period of unpaid leave to allow her to have her illness treated. The letter concluded by stating that it was imperative that they meet soon to discuss the issues and referred to a recent conversation that Ms. Wilmot had with Chief Paul, where Ms. Wilmot indicated that she would be seeing her doctor that week and would let Ulnooweg know of her plans.

Ms. Wilmot did not respond to this letter or return the several phone messages that were left for her.

Mr. Hoskin was prepared to consider a leave of absence, because Ms. Wilmot had been an excellent employee. However, he was not prepared to hold Ms. Wilmot's job open for an indefinite time-frame. "[...deletion...]" Accordingly, Ms. Wilmot's job was terminated on June 26, 2003, with Mr. Hoskin visiting her at her home that day to explain this to her and to give her the termination letter personally.

Ms. Wilmot did apply for long-term disability benefits. The LTD form signed on July 2, 2003 by her physiologist, [sic] Wendy Nickerson, responded "unspecified" to the question "Approximate duration to disability?", and "52 weeks" "gradual return" to the question "How long before the patient will be able to work?"

[5] The essence of what I have said is that I have generally found the facts to be as set out in your briefs. I adopt them (as I have edited them) for today's purpose rather than re-writing them, and will now deal with contentious matters.

[6] At the beginning of summation, counsel advised that the Plaintiff would not pursue the claim based upon the tort of intentional infliction of mental harm. The issues that we're left with for decision in this case are as follows. First was the employment contract between the Plaintiff and the Defendant frustrated by the Plaintiff's illness, and that obviously goes to the **Marshall** factors, [**Marshall v. Harland and Wolff Ltd.**, [1972] 2 All E.R. 715] and/or did the Defendant have cause to dismiss the Plaintiff? I treat those two questions as the first issue.

[7] The second issue is if there was no frustration or no cause for dismissal, what's the appropriate notice period, and that's of course the **Bardal** factors. [**Bardal v. Globe and Mail** (1960), 24 D.L.R. (2d) 140 (Ont.H.C.)]

[8] And finally, the last issue is what if any increase is the Plaintiff entitled to based on **Wallace** factors? [**Wallace v. United Grain Growers** (1997), 219 N.R. 161 (S.C.C.)] And that's if you get past number one and number two.

[9] I have made some factual conclusions on disputed issues as a result of my consideration of the evidence, and these are matters which were not addressed in a common fashion in the parties' statement of facts; I am not casting any aspersions when I am saying that - you indicated what you intended to prove and there's no question of any misrepresentation or anything like that - but they are things that were in dispute, and I have reached conclusions on matters which I haven't already referred to in the parts of your statements of facts that I've included.

[10] The first is the cause of the Plaintiff's illness, and the issue here relevant to the decision I have to make is whether the illness resulted from the Defendant improperly placing too much work burden on the Plaintiff after Mr. Bower's death. I have concluded that the Plaintiff's illness was not the result of the Defendant placing too much work on the Plaintiff; I have concluded that the Plaintiff's illness didn't result from the Defendant overburdening her with work.

[11] After Mr. Bower died, the evidence is clear that the Plaintiff grieved and she grieved sincerely. Her work environment and her duties experienced some modification after Mr. Bower passed away. She was the person in the office, the

evidence indicated, who was very familiar with general administration and general office procedures, and she was consulted to provide information which Mr. Bower previously would have had and would have provided to other people. The Plaintiff did more work after Mr. Bower's death - I find that. But I conclude, despite that, fundamentally the Plaintiff's job did not change. She remained an administrative support person and she didn't assume management duties.

[12] I am not going to refer extensively to the evidence, but I think the situation was captured by Mr. Hoskin when he said on direct examination,

> When I arrived at Ulnooweg in February of 2001, the Plaintiff wasn't doing any aspects of Mr. Bower's job. Robert McGillvray was doing what Mr. Bower did when I got there. Mr. Backman as a C.G.A. was a positive thing - he'd done that for more than five years before I got there.

[13] The evidence in my view doesn't support an allegation that the employer inappropriately increased the Plaintiff's workload. There was some additional work, but the evidence indicated to a large extent she assumed that voluntarily and she's to be complimented for that. She was a good employee who pitched in when times were difficult at work. She worked some overtime, but I do not find that she has established on the balance of probabilities that any increased workload was unreasonably placed upon her, or that it was a primary cause of her health difficulties.

[14] On the issue of workplace changes and workload changes after Mr. Bower's death, I find to be more persuasive the evidence of Mr. Hoskin and Mr. Bernard rather than the evidence of the Plaintiff and Mr. Abram. The Plaintiff's complaints, as highlighted in the various doctors' notes, regularly referred to workplace difficulties, but they generally didn't refer to overwork, at least until May of 2003, and that was the month just prior to her termination and long after the difficulties had developed with her health.

[15] Mr. Hoskin testified that the Plaintiff at no time complained to him about being overworked. He indicated that she worked overtime and she did what she felt she had to do to get the job done. She took work home, but she wasn't complaining about this and there was no indication that it was overwork. In fact, Mr. Hoskin indicated he suggested she not work overtime.

[16] While the Plaintiff was working at Ulnooweg from the time of Mr. Bower's death until 2003, I find the Defendant accommodated her health issues to the extent which would be expected of a reasonable employer. I am speaking now of the period between Mr. Bower's death, including after Mr. Hoskin came to work, up until May of 2003. She received generous time off. She continued throughout at the same or a higher pay level; indeed, the evidence was that she received a $1,500.00 raise to recognize her extra work and she gave that evidence herself. She was eventually given a new position involving less duties but the same pay and the same status.

[17] The Plaintiff did not reveal the nature of her illness to the Defendant. She testified concerning her illness that she had some discussion with Mr. McGillvray before he left, but not with Mr. Hoskin. She acknowledged that she continually advised Mr. Hoskin that she was recovering, and she would advise him that her medication was changing and this might affect her performance, but she didn't disclose the real nature of her illness. Whether she understood it herself or not is difficult to determine, but she certainly wasn't expansive in dealing with the Defendant about it. I find that throughout the period up until May of 2003, the Defendant treated the Plaintiff in a manner which was commensurate with the way an employee having an excellent work record and a strong service commitment to an employer could expect to be treated, and that the Defendant acted in that manner.

[18] Just to refer back to the matter of the disclosure of her medical condition to Mr. Hoskin by the Plaintiff and his reaction, he testified that throughout this period, and he was talking at this stage through 2002 and early 2003, his continuing message to the Plaintiff was that he wanted her to get healthy and he was communicating his concern and his need for her to be healthy - it was not discipline. He gave that evidence in the context of his January correspondence and his March meeting with the Plaintiff and I accept Mr. Hoskin's evidence in that regard. The documentation provided in the evidence shows that the Defendant's treatment of the Plaintiff throughout that period was appropriate and it was fair.

[19] Mr. Hoskin testified, this was on direct examination, that he gave the Plaintiff the January 16th [2003; Exhibit #2, Tab #36] letter, she brought her doctor's note back, and he knew that she wouldn't be back right away. He said, "As we needed someone else, I advertised a position," but the Defendant made it

clear to her in advance that this was happening and that there would continue to be a job for her.

[20] In summary, I find nothing improper about the Defendant's conduct to the end of May 2003, and the Plaintiff has not substantiated any complaint against the Defendant up to that time.

[21] Now, I am going to deal with the issue of frustration. The first legal issue, as I have outlined them, was determination whether the employment contract was frustrated, and what this really amounts to is whether there was an unforeseen disability due to illness. I have considered the authorities which you have referred me to, particularly the **Marshall** case (supra) in England in 1972, and of course the leading Nova Scotia decision, **Miller v. Fetterly and Associates Inc.** (1999), 177 N.S.R. (2d) 44 (S.C.).

[22] The issue boils down to whether the absence from work was such that an employer could not be reasonably expected to await an employee's return any longer. In **Burgess v. Central Trust** (1988), 85 N.B.R. (2d) 225, the Court referred to Howard Levitt's text The Law of Dismissal in Canada, which identifies that as the test of whether an employment contract has been frustrated, and I adopt that.

[23] In this case the evidence indicated that the Defendant, at or about the time of the Plaintiff's dismissal, was prepared to investigate a leave of absence. The evidence from Mr. Hoskin was if the Plaintiff had requested on or after June 3rd [2003] that she receive a leave of absence, the Defendant would have considered granting that and guaranteeing a job for her upon her return. I am going to say more about that later, but I find that to be inconsistent with frustration.

[24] Dr. Nickerson testified and I conclude from her evidence that at the time of dismissal in June 2003, in or about that time Dr. Nickerson expected that the Plaintiff would recover. When she was asked about the effect of termination on her long-term prognosis, Dr. Nickerson testified on direct examination that she didn't see the expected improvement, and then she went on to say if people were functioning well beforehand, that's before the illness, they will improve unless there's neurological damage. From that, I concluded that Dr. Nickerson was not of the view that recovery was not to be expected in June of 2003. She was not concerned about the Plaintiff never returning to work when she met the Plaintiff in

May of 2003, and in that regard Dr. Nickerson said just that - on cross examination she said she was "not concerned about her never going back to work."

[25] In my view the evidence does not support the existence of an established permanent illness or a disability in June of 2003 and I should say, despite the conflicting authorities, it is my conclusion that the Court should assess whether frustration occurred as of the time of dismissal and not make the assessment as of the time of trial.

[26] I have considered the factors set out in the cases, particularly **Miller v. Fetterly**, with respect to frustration such considerations as the expected length of future absence, and whether the employer was prepared to try and accommodate that absence, which in this case the employer certainly gave indications it was prepared to consider doing, including in the June 3rd letter and in Mr. Hoskin's testimony. The Plaintiff was a long-term employee with good employment record; she would have had a long future with the Defendant, if she had continued. She was a valuable employee, but not in a key position - I do not find that she was in a managerial position. She had a very significant but not what could be deemed to be a permanent illness in June of 2003. And based on those considerations and all of the evidence, I have reached the conclusion that the employment contract was not frustrated.

[27] We then move to the issue whether there was just cause for dismissal. By way of some introduction and I have referred to this before, I accept the evidence that the Defendant did not know any significant details of the Plaintiff's illness. I'll just refer to a bit of the evidence on that. Firstly, Mr. Hoskin, and this was on his direct examination, testified that when the Plaintiff came back in July 2002, "I didn't know then or ever what her illness was." He testified later in the context of the information he was providing concerning the situation in April of 2003: "She didn't tell me why she was away before my June 3rd [2003] letter and I didn't know why." And on cross examination he said: "I was not aware that her health difficulties were mental health related." And Mr. Bernard, who worked with the Plaintiff at the Defendant's office until October 2002, testified when he was giving direct evidence: "In 2002 when I was there, the last year before I left, around the office people mentioned the Plaintiff was sick. I didn't question or comment. I knew only that she was sick, I don't know what her illness was."

[28] The Defendant knew generally that the Plaintiff was not well - there's no question about that. That's apparent from as early as the January 16th, 2003 letter, it's clear that the Defendant knew that there was an illness issue. I accept Mr. Hoskin's version over what the Plaintiff indicated with respect to how much the Defendant knew about the Plaintiff's illness. However, I don't accept that it was appropriate for Mr. Hoskin to rely on his ignorance of the details of the Plaintiff's illness to the extent that he did. I think Mr. Hoskin was circumspect, and I can understand why he would be because it was a personal matter, about not making too much inquiry concerning the nature of the Plaintiff's health difficulties; however, he could have obtained more information and his actions can't all be justified on the basis that he simply had no information concerning the extent or the nature of the illness.

[29] I am going to refer on the just cause issue to a couple of points in the Plaintiff's evidence, and this relates to the Plaintiff's understanding of her relationship with her employer just prior to the dismissal. She testified on direct examination and this is in the context of the June 3rd, 2003 letter, she said and I am not saying this is a direct quote, but it's from my notes and it's as close as I could get, it certainly has a sense of it - 'I didn't understand I had to report back to Mr. Hoskin or I would be terminated. There was still no date that I knew that I had to return to work,' and then she continued,

> After receipt of the June 3rd letter, I couldn't leave the house except to get a drive to the doctor's with a jacket over my head. My nerves were totally shot. I couldn't leave the house sometimes, even to go to the doctor. Generally I was on the floor. My mother looked after me and made me eat and drink. Mr. Hoskin had not required a definitive plan to return to work. I didn't have a plan. I didn't feel threatened with termination then. I was waiting for doctor's advice.

[30] Now on cross examination relating to her situation at that time, with respect to the June 3rd letter and her understanding, the Plaintiff testified:

> I don't know how I received it. I read it at the time, I wouldn't say I understood it. I remember him not apologizing about the pay deduction. I didn't feel there was a response to the letter. I was going to the doctor and I took the letter to the doctor.

And she indicated she was still trying to find out when she would have the doctor's okay to go back to work, so she saw no basis to reply to the June 3rd letter:

> I was in no condition to get back in response to the June 3rd letter. I was stressed, terrified, on the floor..

She described her anxiety. And finally, still addressing the June 3rd letter, she said:

> I didn't specifically have a time to tell what my plans were, I didn't tell anyone my plans. I was waiting to see my doctor, I had no specific time to report back.

She acknowledged as a followup to the June 3rd letter:

> It is possible there were phone calls from Ulnooweg to my home that I did not return. I was incapacitated then. I didn't feel my job was threatened by the June 3rd letter. I was not well enough to derive anything from the letter. My mind was in chaos and I couldn't process the information.

[31] I accept the Plaintiff's evidence on the issue of her condition in June of 2003 and her understanding of the June 3rd letter. I find given the course of the dealings between the parties up to that time, it was not unreasonable for her to treat the letter as she did, and to not understand it to be an ultimatum. The June 3rd letter was equivocal - it left things open pending the doctor's visit and it referred to an extended leave of absence. The reference to not retaining the Plaintiff as an employee was in the context in the letter of an alternative to remedying the current situation as referred to in the last paragraph. The Plaintiff was not told in the letter that she was not moving toward a remedy. In my view the requirement about reporting back after her doctor's meeting was not posed as an ultimatum. It was couched in the context of an invitation or a suggestion that she explore long-term disability or leave of absence arrangements.

[32] After reading the letter and hearing the evidence of both parties with respect to the letter and the position of the parties at the time, I accept the Plaintiff's evidence that she didn't feel that her job was threatened at the time that letter was issued. I find that it was reasonable for her to reach that conclusion, and that is not inconsistent with Mr. Hoskin's evidence of the Defendant's motive. I am just going to refer to some extracts from his evidence and again, I am referring to my notes, but I am satisfied that I have accurately recorded what he said. In the context of the June 3rd letter, Mr. Hoskin testified, and this was on direct examination:

> I was asking her when she'd return..

I'll go back a bit:

> It was a noted deficiency that she wasn't filling the job. I was asking her..

(this is at the time he wrote the letter)

> ..when she'd return and if she needed time. If she said that she did, I'd have..[virtually to the effect] I'd have done all possible or I'd have made efforts to have something for her when she came back.

[33] On cross examination Mr. Hoskin said, or the essence of his evidence was,

> From March the 23rd until the date of termination I was asking when the Plaintiff would be able to return to work..

(His words used were to call her by name rather than "the Plaintiff")

> ..and I was advising if it needed to be later, I was a hundred per cent willing to consider giving her an extended leave.

He indicated that after June 3rd, 2003, he was asking Terry to advise when she would be able to return to work, and he would be willing to consider a leave of absence to accommodate her. He said when referred to page 3, the final paragraph of the June 3rd letter, he would have considered extending unpaid leave, he would have had to take it to the board for approval.

[34] And at the conclusion of his cross examination, he said,

> She never answered the question. If she had got back in response to my June 3rd letter, I would have even tried to get the board to confirm I would be able to guarantee a position for her after 12 months.

And he acknowledged at the conclusion of his cross examination on that issue that the June 3rd letter didn't give a definite date for a response. His final answer on cross examination on that point was:

> At no time did I tell the Plaintiff that if she didn't get back by a certain date she would be terminated.

[35] I have concluded from all the evidence that the termination letter of June 26th resulted from the Plaintiff's failure to respond to the June 3rd letter. I have referred to some evidence already in that regard. I am also going to refer to Mr. Hoskin again on direct where he said, "The termination letter.." and he was referring to the Tab 54 letter of June 26th, 2003:

> I decided to terminate. It was difficult. We had to fill the new position. It was five weeks since she had spoken to me, four weeks since any communication with the office. She had kept assuring me everything was fine, no indication it was otherwise, except she didn't come to work. She didn't get back to me in response to the June 3rd letter. I didn't know when she would get back.

[36] And then on cross examination..I have already referred to some of the cross examination about the June 3rd letter including Mr. Hoskin's evidence, "At no time did I tell the Plaintiff that if she didn't get back by a certain date, she would be terminated." The cross examination concluded with evidence that he indicated he denied that the reason Terry was terminated was a failure to report to him. However, he was referred to his discovery examination and reminded that what had changed between June 3rd and June 26th was that she had not reported. His answer at trial was, "It wasn't as simple as that," but then he went on to say that, "If the Plaintiff had asked for convalescence beyond June 26th, I would have taken the request to the board." And he indicated that if any time up to June 26th, she'd asked for time, he would not have terminated her - he would have recommended a leave of absence but it might not have been accepted by the board.

[37] I conclude from all that evidence that if the Plaintiff had responded or had asked for a leave of absence, she would not have been terminated - at least, it's highly unlikely she would have been terminated, and I am left with no other conclusion other than the Plaintiff's non-response to the June 3rd letter was really what triggered the termination.

[38] The Plaintiff's failure to advise the nature of her illness and the extent of her progress in the absence of a specific request, and her not being completely forthright about her condition and her prognosis, in my view in the circumstances of this case don't give rise to frustration or just cause. Until June of 2003 the Defendant overlooked the failure of the Plaintiff to be totally candid about her health situation. The inference I find from her evidence and from the evidence of

Dr. Nickerson is that she was probably herself in some sort of denial about her condition.

[39] I have considered her conduct in not fully advising the Defendant of her circumstances. In my view it doesn't create a fact situation which warranted dismissal in June of 2003. It is not the overriding consideration that the Defendant suggests it is, given what I would describe as at least the tacit condonation by the Defendant of the Plaintiff's absences and the not discussing fully the nature of her illness - she wasn't requested to do so up until June of 2003. The Defendant was very reluctant to inquire about the illness and that's understandable, but it shouldn't now be able to justify a dismissal on the basis that a sick Plaintiff didn't reveal the details of a mental or psychological illness, which on the evidence she was probably in any event incapable of expressing or acknowledging, when the Defendant didn't seek the information.

[40] In my view the failure to provide an update in her health after the June 3rd letter is the event which led to her dismissal. If that event hadn't happened, Mr. Hoskin's evidence is that she would not have been terminated and things like leave of absence or long term further absence from work would have been explored.

[41] So I conclude that there was no just cause for the Plaintiff's dismissal in June of 2003, and I have already concluded there was no frustration of the contract.

[42] That brings us now to the period of notice to which I find the Plaintiff is entitled in the circumstances. I have considered the **Bardal** factors, obviously, and the cases that the parties have presented to determine reasonable notice. I have looked at all the factors set out in those cases in the context of the evidence, including that the Plaintiff was about 40 years of age, and the length of her service, about 11 years. I have considered the unique nature of her employment situation, her particular background and the particular cultural suitability that she had, I mean cultural in the work environment, with this particular employer with her community situation. I have also considered her level of responsibility which I don't find to be at the high end advanced by the Plaintiff, but of an administrative rather than management nature. Considering all those issues and the authorities, I have determined that a reasonable notice period would be ten months and I award as damages ten months salary which is $32,760.00. I have not added the four

per cent, which the Plaintiff sought. The ten months represents five-sixths of her annual salary, by my calculation anyway.

[43] I've then given consideration to the Wallace factors and whether there is conduct here on the Defendant's part which exacerbates the situation. I am going to make a couple of brief references to the evidence. In my view Dr. Feltmate did not..I say in my view..in Dr. Feltmate's view the Plaintiff's long-term disability situation is not attributed to her dismissal. I refer to the discovery evidence from Dr. Feltmate at pp. 47 and 48 in that regard, and I don't believe it is necessary that I read it all, but I'll just highlight one passage at question 290. The question was,

> So it would have been a heightened stress because of the termination, but that would have passed and she was back to where she was before, I'm just trying to understand?

And the answer was,

> A. Well I guess I'm saying that, you know, before that she was having significant difficulties.
>
> Q. 291 Yuh. So, you know, you don't attribute the ongoing difficulties to the fact that she was terminated because she was having them?
>
> A. Right.

[44] And in her report Dr. Feltmate said in para. 2, this is her report of May 25, 2005, which is Tab #5 of Exhibit #1,

> While Ms. Wilmot's termination was stressful, I believe her emotional difficulties were ongoing at the time and would have been ongoing even without termination.

[45] Dr. Nickerson testified concerning the effect of the termination. Dr. Nickerson indicated that she had completed, this is on direct evidence, that she had completed the long-term disability forms for the Plaintiff's insurance company on July 2nd of 2003. She suggested unspecified disability duration of 52 weeks before work return - that was if she found a less stressful job and returned gradually. She went on to say,

> If she had not been terminated from employment, my opinion would have been the same.

So I conclude from that that Dr. Nickerson did not attribute the long-term difficulties to the event of termination, but the condition was pre-existing. Now Dr. Nickerson did testify that she didn't accept Dr. Feltmate's report which I have quoted at para. 2. She thought that was inconsistent. She indicated some emotional difficulties. Dr. Nickerson indicated:

> Some emotional difficulties would have been ongoing without termination, but not to the degree that she experienced the difficulties.

[46] But aside from the medical evidence, having considered all of the evidence and the conduct of the parties, I am not satisfied that there was any bad faith conduct by the Defendant with respect to the manner in which the Plaintiff was dismissed. In my view, bad faith conduct is a prerequisite to application of the **Wallace** factors. Indeed, I conclude to the contrary that the Defendants, while I do find they did dismiss the Plaintiff without cause in the circumstances in June of 2003, they had showed responsibility and compassion up to that time and indeed in the manner of dismissal. While I found the dismissal wasn't justified, Mr. Hoskin tried to make the best of it by personally delivering the letter to the Plaintiff and was prepared to discuss it with her. So I have concluded the Defendant is liable for dismissing the Plaintiff effectively for non-response to the June 3rd letter. Given the circumstances and given the condonation and the encouragement that the Defendant had been providing right up to that time, and the failure to indicate that there was any disciplinary process underway or to give any ultimatum, I find that cause is not established for dismissal. But the Defendant's conduct falls far short of bad faith in either the lead-up to or in effecting the termination, so I would not impose any **Wallace**-type damages.

[47] So in the result, the Plaintiff will have judgment against the Defendant for $32,760.00 plus interest which I expect the parties can agree on; if not, I am prepared to address it. I'm prepared to address costs in any manner the parties want. I have some views on costs, but before I express them, they're subject to modification, I might add, I'd be prepared to hear from you either now or if you want to make submissions later. In my view it can properly be dealt with in a pretty straightforward fashion, but if you want to talk about it or make some submissions now or later, that's fine.

[48] (COUNSEL SUBMISSIONS RE COSTS..)

[49] I gave considerable thought to costs before I came here, as I was working on the decision, and in my view, the costs award should be based upon, I agree with Mr. Bryson, that the appropriate amount in this case is the 1989 Tariff A, Scale 3 - a $35,000.00 case. I went to $35,000.00 rather than $30,000.00 because damages were closer to $35,000.00 than thirty, and that gives $3,750.00 which is not a very large amount of money, given what legal costs are - I recognize that, but I award $3,750.00 which is the Scale 3, Tariff A amount corresponding to $35,000.00 in issue. Concerning the reason that I stuck with Scale 3 and the $35,000.00 amount in issue, I am starting from the premise here that the costs are low on the scale and there is a tendency to go a little higher because the costs are so low in relation to the new tariff. So I would have been inclined, except for the reasons that I am going set out in a minute, to find a way to go above the scale if the Plaintiff had been totally successful.

[50] This is the fourth day, maybe it's the fifth, it is the fifth, I guess that we've been together, but in my view that's to a significant extent because of the issues which the Plaintiff kept in the case until the end - the intentional tort aspect and to a lesser extent, but still significant, the Wallace factors. The Plaintiff was claiming a great deal more than $32,000.00 here, and I don't want to speculate on what settlement might have happened or what settlement discussions there might have been, but the fact that we had a long trial was significantly contributed to by the Plaintiff's claiming the intentional tort and that added to the length of the evidence, it added to the length of the submissions which were required and it probably made a resolution in advance of trial much more difficult.

[51] So given those factors, I am not going to move beyond the regular $35,000.00 Tariff A, Scale 3 range for the Plaintiff. With respect to disbursements, in my view the Plaintiff first of all is entitled to recover all of its disbursements, one hundred per cent of its disbursements short of the medical issues which I'll address in a minute, and if they can't be agreed they can be taxed. With respect to the disbursements incurred for the two medical experts, I am directing that the Plaintiff recover 75 per cent of the disbursements for that. I am satisfied that at least 25 per cent of the costs of the medical experts went to wrongful termination and factors which related to the part of the Plaintiff's claim where the Plaintiff did not succeed; and I take Mr. Bryson's point that there may have been less discovery

and less testimony and less out-of-pocket expense for the doctors if the issue had been solely a matter of reasonable notice for a wrongful dismissal. So I award costs on that basis. And I can say I'm trying to be fair and I hope I have been, but that's the basis on which I am trying to do it. That's a gratuitous comment it's a difficult case to award costs. I know that the Plaintiff has been put to a lot of expense here and the award hasn't been a large award. On the other hand, the Defendant succeeded in defeating significant aspects of the Plaintiff's claim, and for that reason I have reached the conclusion I have.

J.