

** Unedited **

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Hossni v. Weston

Between

Faraj Hossni, Plaintiff, and
Peter Weston and Peter Weston & Associates Ltd., Defendants

[1994] O.J. No. 2299
Action No. 93-CQ-35431

Ontario Court of Justice - General Division
Toronto, Ontario
Pitt J.

Heard: August 15, 1994.
Judgment: October 12, 1994.
(13 pp.)

Master and servant — Wrongful dismissal — Dismissal without cause — Notice of dismissal — Reasonable notice, what constitutes — Damages — Mental distress.

Action for damages for wrongful dismissal. The plaintiff was employed by the defendant corporation in a managerial position for an indeterminate term on an annual income of \$52,000. Following the implementation of some company reorganization measures, the plaintiff's employment was terminated without due notice. He had been in the defendant's employment for 20 months. The only issues for determination were the appropriate length of notice and the plaintiff's claims for damages for mental distress, loss of reputation and punitive damages. The last three heads of damages arose from the prosecution of the plaintiff for extortion on the basis of information provided to the police by the personal defendant in respect of the plaintiff's conduct in negotiating his compensation after the termination of his employment. He was discharged at the preliminary inquiry. As a result of the arrest on the extortion charge, incarceration and two court appearances immediately following the birth of his second child, the 47-year-old plaintiff experienced mental distress in the form of shame and humiliation, and continued to suffer from paranoia in the presence of police up to the date of the trial.

HELD: Action allowed. Plaintiff entitled to four months' salary of \$17,336 in lieu of reasonable notice. Damages for mental distress assessed at \$5,000. Claims for damages for loss of reputation and punitive damages were dismissed.

Thomas J. Hanrahan, for the Plaintiff.
Michael E. Caruso, for the Defendants.

¶ 1 **PITT J.**— This is an action for damages for wrongful dismissal.

¶ 2 The parties have agreed that there is no issue as to cause and there is in fact no issue as to mitigation of damages. The issues are the length of pay in lieu of notice and claims for damages for mental distress, loss of reputation and punitive damages. The last three heads of damages arise from the prosecution of the employee for extortion on the basis of information provided by the employer to the police in respect of the employee's conduct in negotiating his compensation.

¶ 3 The employee was discharged at the preliminary inquiry.

Factual Background

¶ 4 The plaintiff, a 47 year old married man with a Bachelor of Commerce degree, was employed by the defendant corporation, a planning consultant controlled by the personal defendant, as a Comptroller and Office Manager in February, 1990, at a starting salary of \$45,000 per annum.

¶ 5 It is agreed that, at least until the spring of 1991, the plaintiff was a very good performer as evidenced by the fact that by March, 1991, he had received three increases in salary; first to \$47,500, then to \$48,500, then to \$52,000. In some respects he was even an exemplary employee, in that he had on occasions voluntarily refrained from negotiating his pay cheques to accommodate what he perceived as cash-flow problems being experienced by his employer and for sometime he had taken his own computer to the office when his employer's computer was malfunctioning.

¶ 6 The plaintiff testified that in March, 1991, the personal defendant promised him an increase in salary to \$55,000 per annum to take effect in September, 1991. The personal defendant testified that the increase was conditional on the state of the corporation's finances.

¶ 7 While the evidence hereafter is not completely unambiguous, it does seem that by late summer of 1991, relations between the employee and the personal defendant had deteriorated somewhat. On November 1, 1991, the plaintiff was dismissed with one month's notice although there was apparently some understanding that he would work intermittently during the month of November while he sought alternative employment and assisted his wife who gave birth to their second child two weeks before the notification of his dismissal. Their first child was at that time approximately four years old.

¶ 8 The personal defendant apparently did not simply communicate to the plaintiff a specific sum of money to be paid in lieu of notice or pursuant to the Employment Standards Act. It does appear that, for whatever reason, a negotiating window was left open. In any event on or about November 15, 1991, the defendants, through an associate by the name of Michael Larkin, who had worked closely with the plaintiff, advised the plaintiff that he should not continue coming to work, and about that time a meeting was arranged at a nearby restaurant where the plaintiff was to meet with Larkin to collect his pay cheque and separation certificate, and to deliver a company computer which the plaintiff kept at home. After that meeting Larkin reported to the personal defendant that the plaintiff had showed him a file on his car seat which the employee said contained damaging information about the corporate defendant which might be disclosed to the police and/or clients of the corporate defendant. A second meeting was arranged because the separation certificate was completed improperly and the cheque was not prepared.

¶ 9 At the second meeting the personal defendant attended at the same restaurant and questioned the plaintiff about the alleged threat made to Larkin. The plaintiff categorically denied making a threat of any kind and denied either having spoken of the "file" or indeed possessing such a file. The plaintiff was arrested immediately after leaving the restaurant and taken to a police station in the Town of Vaughan. He was later taken to Newmarket where he was stripped of his watch and other personal belongings. He was kept in a prison cell for about 45 minutes and after being charged with extortion was dropped off by the police at about 8:30 p.m. in an area he described as "the middle of nowhere". Since he had very little money in his possession he at first did not attempt to take a taxi but later decided to take a taxi to the nearest money machine where he obtained enough cash to be driven home.

¶ 10 The plaintiff testified that he was utterly humiliated and too ashamed to mention the arrest--even to his wife.

¶ 11 He made two appearances in court. On the second appearance on June 10, 1992, His Honour Judge P.A. Sheppard, after hearing the evidence of the personal defendant and Michael Larkin, discharged the plaintiff.

¶ 12 Very little evidence was led by either party from which the court could reasonably conclude that there was an acrimonious dispute between the parties as to the entitlement of the plaintiff or that there existed any conduct on the part of the defendants which could possibly form the basis for the alleged threat, blackmail or extortion.

¶ 13 The elements of the dispute, at the worst, were:

- (a) should the plaintiff's salary for the notice period be based on an annual salary of \$55,000 which the plaintiff alleged was promised to him effective from September, 1991, or should it be based on the figure of \$52,000 contended for by the defendant?
- (b) should the plaintiff be entitled to one or two months salary?
- (c) what was the statutory vacation pay entitlement?
- (d) was the plaintiff entitled to a few days pay for so-called overtime work?

Assessment of Evidence

¶ 14 Nothing in the history of the relationship between the parties provided the underpinning for the alleged extortion.

¶ 15 Defence counsel made much of the fact that the plaintiff's earnings prior to his employment with the defendant, were at a much lower level, but the plaintiff did not seem evasive or perturbed about admitting that fact. In his testimony the plaintiff gave the appearance of modesty and much moderation. He admitted that he sought no medical assistance of any kind in consequence of his legal problems, and that he took no medication. Apart from the feelings of humiliation and some paranoia in the presence of police officers he expressed no bitterness, nor predicted any long-term sequelae.

¶ 16 There was nothing in the demeanour or the testimony of the defendants to suggest maliciousness. The personal defendant testified that he thought the relationship was not as good during the last eight months as it was in the first year, but it never deteriorated to the point of animosity. Michael Larkin said he had a good working relationship with the plaintiff to the end, and as indicated earlier the plaintiff spoke of no serious dispute during his term of office.

Law

¶ 17 The criteria for determining the reasonableness of notice was laid down in *Bardal v. Globe and Mail Ltd.*, [1960] O.W.N. 253 (H.C.).

¶ 18 The factors to be considered are the character of the employment, the length of service, the age of the employee, and the availability of similar employment having regard to the experience, training and qualifications of the employee.

¶ 19 On the basis of these criteria, I find that four months notice would be appropriate. The employee was the company's Comptroller and Office Manager, and his compensation reflected his education, skill and responsibility. He was 47 years of age, he had been employed for 20 months, and his position was for an indefinite term. Up to the time of trial, he had not yet found alternative employment.

¶ 20 In *Pollinger v. Bergman Graphics Limited* (1993), 18 O.R. (3d) 31, Adams J. granted four months salary in lieu of notice to a 50 year old Journeyman Litho-stripper with annual earnings of approximately \$75,000, who was wrongfully terminated after 18 months.

¶ 21 On a balance of probabilities, I accept the defendant's testimony that the rate of \$55,000 was conditional on the company's finances which had deteriorated during 1991, and accordingly I find that the salary in lieu of notice should be calculated on the basis of \$52,000 per annum resulting in a monthly salary of \$4,334. That sum multiplied by four produces a total of \$17,336. From this must be deducted the salary for the month of November already received, leaving a balance of \$13,002 on which the plaintiff will be required no doubt to pay income taxes.

¶ 22 Counsel for the defence has submitted that unemployment insurance and a baby-sitting allowance received by the plaintiff should be deducted. I do not agree.

¶ 23 The plaintiff has made the following other damage claims:

- (a) for mental distress;
- (b) for loss of reputation;
- (c) punitive damages.

¶ 24 I will discuss each heading briefly.

(a) Mental Distress

¶ 25 Damages for mental distress include cases properly classified as aggravated damages, and punitive damages. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.

¶ 26 In *Vorvis v. Insurance Company of British Columbia*, [1989] 1 S.C.R. 1085, from which most of the above has been condensed, McIntyre J. said at p. 1099:

Aggravated damages are awarded to compensate for aggravated damages.

And at p. 1103:

I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given.

And later at p. 1103:

I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable...

It would seem therefore that damages under this head may be awarded in a proper case. A further question, however, is still to be asked and that is whether the conduct complained of can be said to have arisen out of the wrongful dismissal itself. In *Vorvis*, the Court refused to grant such relief where the conduct complained of preceded the wrongful dismissal. Can the conduct complained of here be said to have arisen out of the wrongful dismissal or was it subsequent to the dismissal?

¶ 27 There was nothing illegal about the defendant's conduct of its business and it would have been entirely irrational for the plaintiff to show a client the client's own file. It is therefore difficult to find any other explanation for the defendant's involvement with the police than as a negotiating tool.

¶ 28 Accordingly it must be said that the conduct complained of "arose out of the wrongful dismissal itself".

¶ 29 As a result of the arrest on the extortion charge, incarceration and two court appearances immediately following the birth of his second child, the plaintiff experienced mental distress in the form of shame and humiliation and continued to suffer from paranoia in the presence of police up to the date of the trial.

¶ 30 Under this heading therefore damages of \$5,000 will be awarded.

(b) Loss of Reputation

¶ 31 There is no evidence of damage to the plaintiff's reputation.

¶ 32 In any event, in *Peso Silver Mines Ltd. (NPL) v. Cropper*, [1966] S.C.R. 673 doubt was cast on the availability of damage under this head for wrongful dismissal actions.

¶ 33 Accordingly, there will be no damages awarded under this head.

(c) Punitive Damages

¶ 34 When can punitive damages be awarded? McIntyre J. answered the question in *Vorvis* at p. 1106, as follows:

Punishment may not be imposed in a civilized community without a justification in law. The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff.

And later on at p. 1107-1108:

In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award... In an action based on a breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant has breached the contract, the remedies open to the plaintiff must arise from the contractual relationship, that "private law", which the parties agreed to accept. The injured plaintiff then is not entitled to be made whole; he is entitled to have that which the contract provided for him or compensation for its loss. This distinction will not completely eliminate the award of punitive damages but it will make it very rare in contract cases.

Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature.

¶ 35 Under this heading there will be no damages.

Total Damages

¶ 36 In the result, the total damages awarded is \$18,002.

Interest

¶ 37 The plaintiff shall have interest on the judgment at the rate of 7% from the date of service of the statement of claim to the date of payment.

Costs

¶ 38 The parties were very economical in their conduct of the action. The plaintiff will have his costs in the amount of \$1,500 plus all proper disbursements. If there is any problem with disbursements, counsel may speak to me.

PITT J.

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