Employment Law Update

In the last quarter there have been a number of interesting decisions in the area of employment law in British Columbia. In this column I will review four notable decisions. Those decisions involve an analysis of the duty to mitigate by accepting re-employment from the dismissing employer, circumstances where dishonest conduct can give rise to cause, two cases involving claims for aggravated and punitive damages and one decision involving assessment of notice and damages for a dismissed long term employee.

The Supreme Court of Canada declined an application for leave to appeal in *Steel v. Coast Capital Savings Credit Union* [1]. The Court of Appeal decision in *Steel* was the subject of a previous employment law update. *Steel* involved the plaintiff's claim of wrongful dismissal after she gained unauthorized access to employee's "personal folders". The Defendant dismissed the plaintiff for cause on the basis that she had accessed a confidential document without the required permission. The trial judge found that there was just cause for the dismissal. A majority of the court of appeal dismissed the plaintiff's appeal against that judgment. As will be discussed below, the *Steel* decision has recently been used at the trial level to assess whether cause exists.

Duty to Mitigate by Accepting an Offer of Re Employment

In August our Court of Appeal had an opportunity to consider the duty to mitigate in the context of the requirement for an employee to accept re-employment following termination. The burden on the employer is to prove a failure to mitigate and a dismissed employee cannot recover damages that could have been mitigated. This applies to offers to return to employment, provided the offer to return to employment is to an offer that an objectively reasonable person would accept.

The leading case on the duty to mitigate by returning to employment with the dismissing employer is *Evans v. Teamsters local Union No. 31* [2]. In that decision, the Supreme Court of Canada upheld a decision of the Yukon Court of Appeal setting aside a damages award on the basis that Evans had not mitigated his damages when he refused to accept an offer of re-employment from the Union. Mr. Justice Bastarache, writing for the majority said as follows:

> [28] …Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and not to penalize the employer for the dismissal itself.

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[1] S.C.C. McLachlin C.J., Wagner & Gascon JJ., 36434, 9/17/2015, on appeal from 2015 BCCA 127, [2015] C.D.C. 58345

[2] 2008 SCC 20

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> [30]…Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "where the salary offered is the same, where the working conditions are not substantially different or the work demeaning and where the personal relationships involved are not acrimonious" (*Mifsud v. Macmillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, at p. 710). In *Cox,* the British Columbia Court of Appeal held that other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12 – 18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar,* at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes,* [1980] 2 S.C.R. 880), it is extremely important that the non-tangible elements of the situation – including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements – be included in the evaluation.

Our Court of Appeal considered and applied these legal principles in deciding the case of *Fredrickson v. Newtech Dental Laboratory Inc.*[3], a decision of Mr. Justice Donald, Madam Justice Saunders and Mr. Justice Frankel. The appeal was from a February 28, 2014 decision[4] in which the dismissed employee was found to have failed to mitigate her damages when she refused an offer of re-employment from the defendant employer. Ms. Fredrickson had been employed by Newtech for eight and a half years at the time of termination in July 2011. Newtech was a small company with only five employees, including Ms. Fredrickson. Ms. Fredrickson was a registered dental technician assistant. She had had a good working relationship with the owner of Newtech over the years and worked closely with him. In 2010 and 2011 Ms. Fredrickson had a considerable amount of stress relating to an illness of her husband and an injury to her son. Ultimately in April 2011 she went on medical leave. She returned to work on July 20, 2011 at which time she was laid off because of insufficient work.

Ms. Fredrickson hired legal counsel and a demand letter was sent to Newtech in September 2011. Newtech responded on September 23, 2011 directing that Ms. Fredrickson return to work on September 26, 2011. On October 18, 2011 Ms. Fredrickson commenced legal action claiming

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[3] 2015 BCCA 357

[4] 2014 BCSC 335, Chilliwack Docket No. S23532

damages for wrongful dismissal. On October 19 Newtech offered to re-employ Ms. Fredrickson and to pay her unpaid wages from July 20, 2011 until she was invited to return to work on September 26, 2011. The offer of re-employment was repeated on a number of occasions, all of which Ms. Fredrickson declined, saying that Newtech's behaviour since the time that she had been laid off had broken the employment relationship such that it was reasonable for her to decline to return to work at that small office.

The trial judge concluded that there were no barriers to Ms. Fredrickson accepting the offers of re-employment and that her acceptance of that offer would have been the reasonable thing to do in the circumstances. He therefore found that she had failed to mitigate her damages and awarded damages for the period only from July 20, 2011 when she was laid off until September 23, 2011 the date that she was first offered re-employment.

Dishonest Conduct Constituting Cause

The British Columbia Supreme Court dealt with another case involving a claim by a bank that it had just cause for termination based on dishonest conduct. In *Lau v Royal Bank of Canada* [5] the Court found that the bank had failed to prove the allegations made against the plaintiff. The termination followed an investigation that resulted from a client complaint. The client had complained about the manner in which the plaintiff handled the purchase of mutual funds on her behalf. Specifically she complained that she was asked to fill out forms and sign forms without understanding what they were or why they needed to be completed. The plaintiff indicated that she had a co-worker in the meeting with the client and the client disputed this, stating that there was no one else present in the meeting.

Following receipt of the complaint, the bank conducted an investigation and concluded that the plaintiff had wrongly recorded the source of the funds used to purchase the mutual funds and that he had falsely indicated that there was a second employee in the interview with the client. The bank made a determination based on the results of their investigation to terminate the plaintiff for cause. Because of the nature of his role with the bank, the for cause termination triggered an obligation on the bank to provide a notice of Termination under the *Securities Act.* This in turn affected the plaintiff's ability to find replacement employment.

In analysing whether just cause existed, the Court referred to the Supreme Court of Canada decision in *McKinley v. BC Tel* [6] and the BC Court of Appeal decisions in *Roe v. British Columbia Ferry Services Ltd.*[7] and *Steel v. Coast Capital Savings Credit Union*[8]. The Court applied the two part test for determining whether an employer is justified in terminating an employee on the grounds of dishonesty or deceit that was established and confirmed in these

[5] 2015 BCSC 1639
[6] 2001 SCC 38
[7] 2015 BCCA 1
[8] 2015 BCCA 127

decisions. Madam Justice Loo summarized her analysis of the existence of cause based on dishonesty by quoting the following passage from the *Steel* decision:

> [28] The governing principle from *McKinley* is that a trial judge is tasked with determining whether, in the totality of the circumstances, the alleged misconduct was such that the employment relationship could no longer viably subsist. *McKinley* at paras. 56 – 57. However, the inherent value of the job to the employee need not be expressly considered in determining whether there was just cause to dismiss. Put differently, the trial judge is not obligated to formally balance the length and quality of service with the nature and severity of the misconduct in determining whether there was just cause to dismiss, though it may be appropriate on the facts of a particular case to engage in just such an analysis.
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> [29] The framework adopted by the court in *McKinley* focuses on the nature and severity of the misconduct in relation to its impact on the employment relationship. It is not a balancing exercise between the value of the employment to the individual and the severity of the misconduct.

The analysis of cause was concluded with an emphasis on the burden of proof of an allegation of cause being on the employer and that the standard of proof is on the balance of probabilities. After reviewing the evidence Madam Justice Loo found that the defendants had not discharged the burden of proving that the plaintiff had lied about the meeting and that the nature of degree of his misconduct in not properly recording the funds did not warrant the dismissal for cause and accordingly he was wrongfully dismissed. She concluded that an appropriate period of reasonable notice was nine months, noting specifically that she has not taken into account the manner of his dismissal or the investigation leading to his dismissal in determining that nine months was appropriate notice.

<u>Aggravated and Punitive Damages</u>

The plaintiff in *Lau* also made a claim for aggravated damages in the amount of $30,000 on the basis that the bank did not meet its duty of good faith towards him on the basis of four factors:

1. The bank did not conduct a thorough and complete investigation;
2. The bank did not give him an opportunity to respond to the allegations;
3. The bank humiliated him by closing his personal bank account; and
4. He was treated differently than other employees who had made the same mistake in recording transactions and the practice was seen by others as an acceptable practice.

Madam Justice Loo reviewed the law with respect to awards of aggravated damages in wrongful dismissal cases, quoting the following from *Vernon v. British Columbia (Liquor Distribution Branch)*[9]*:*

> [369] Aggravated damages in wrongful dismissal cases are compensatory in nature. It is an implied term of an employment contract that an employer will act in good faith in the manner of dismissal. *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76, 14 B.C.L.R. (5th) 1 at para. 48.
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> [370] In *Honda,* the Supreme Court of Canada reviewed the history of the law relating to damages in case of employment termination, noting that the aggravated damages must be considered in the context of a breach of the employment contract. The court held that aggravated damages were recoverable for breach of contract if such damages were contemplated by the parties at the time they entered the contract. As an employment contract is inherently subject to cancellation on notice, or payment in lieu of notice, damages for mental distress caused merely by the dismissal are not recoverable since dismissal is a clear legal possibility.
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> [371] In *Honda (Honda Canada Inc. v. Keays,* 2008 SCC 39) Bastarache J. summarized the discussion of aggravated damages at paras. 57 – 59:
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> > [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace,* namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).
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> > [58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is part of the bargain in the reasonable contemplating of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace,* the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an

[9] 2012 BCSC 133

> extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).
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> [59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same was as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99 – 100)

Madam Justice Loo awarded $30,000 in aggravated damages based in part on the inadequacy of the investigation. To avoid double compensation she refused to award punitive damages, noting that although the conduct of the employer arguably supported such an award, it was that conduct that resulted in the award of aggravated damages.

The second decision which considered a claim for aggravated and punitive damages was *Kong v. Vancouver Chinese Baptist Church*[10] . This case concerned the claim of a dismissed pastor. The pastor was dismissed without cause and the case considered both the adequacy of the notice provided as well as the claim for aggravated and punitive damages. During the course of determining that the plaintiff's employment would be terminated a number of documents were disclosed to the membership of the church as well as other church leaders which contained unproven statements and allegations that were critical of the plaintiff's character and leadership. These documents were released to the members of the church at large and to pastors from other representative associations. In concluding that this conduct was unduly insensitive in the manner of its dismissal of the plaintiff and awarding $30,000 in aggravated damages, Justice Funt reviewed extensively the law relating to awards of aggravated damages.

[10] 2015 BCSC 1328

The starting point for an assessment of whether aggravated damages will be awarded is the Supreme Court of Canada's decision in *Honda Canada Inc. v. Keays*[11]. The fact that hurt feelings and distress result from the termination on its own is not sufficient to form the basis for an award of aggravated damages. An award of aggravated damages is compensatory, not punitive. The Supreme Court of Canada in *Honda* observed as follows:

> [56]…The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal sine the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

However, aggravated damages may be awardable where the manner of dismissal would not have been contemplated at the time the employment contract is formed. An employee is entitled to expect to be dealt with fairly by his employer. If they are not, an award of aggravated damages may be appropriate. In *Honda* the Supreme Court of Canada said as follows:

> [57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."

Justice Funt found that the conduct of the employer in circulating the documents which contained unproven allegations and innuendo directed at the plaintiff's character was unduly insensitive and justified an award of aggravated damages.

The plaintiff also claimed punitive damages. Punitive damages are not compensatory, but rather are intended to punish the employer. For conduct by employers during the course of termination to result in punitive damages, the conduct must be found to be "malicious and outrageous". In *Honda* the Supreme Court of Canada stated:

> [62]…Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.

In *Fidler v. Sun Life*[12] the Supreme Court of Canada described the difference between aggravated and punitive damages and the circumstances where punitive damages are awardable as follows:

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[11] 2008 SCC 39
[12] 2006 SCC 30

> [61] While compensatory damages are awarded primarily for the purpose of compensating a plaintiff for pecuniary and non-pecuniary losses suffered as a result of a defendant's conduct, punitive damages are designed to address the purposes of retribution, deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18, at para. 43.
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> [62] By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency – the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten* at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

Justice Funt found that the actions of the employer in the manner of dismissal were unduly insensitive but they were not such as to be considered malicious and outrageous such as to attract punitive damages.

Notice and Damages for a Long Term Employee

Madam Justice Harris considered reasonable notice and various damages principles including entitlement to vacation pay and pension benefits during the period of notice and mitigation in her decision in *Liboiron v. IBM Canada Ltd.*[13]. The decision provides a good summary of the law of reasonable notice and of the principles involved in the assessment of damages. Mr. Liboiron was 57 years old at the time of his termination. He had worked for IBM or various predecessors for 32 years. His job involved providing technical support regarding the use and operation of IBM's products and services, including the installation and maintenance of computer hardware and software. His annual salary at the time of termination was $63,240 and in addition he was entitled to five weeks vacation each year and pension contributions equivalent to 6% of his salary.

With respect to reasonable notice, the employer argued that the position was technical and non-managerial and that a reasonable period of notice was in the range of 12 to 15 months. The employee argued that the role was a senior administrative role and that a period of 20 months was appropriate notice. The specific factors the employee pointed to were the length of service, his age at the time of dismissal, his lack of familiarity with the job market, the specialized area of

[13] 2015 BCSC 1523

information technology in which he worked and the defendants decision to characterize his dismissal as "retirement". Madam Justice Harris agreed with the dismissed employee, finding that he should have been given 20 months notice of the termination.

With respect to the damages that the employee was entitled to as a result of the employer's failure to provide reasonable notice, in this decision there were three issues that were addressed:

1. Entitlement to vacation pay during the period of notice;
2. Entitlement to pension contributions during the period of notice; and
3. Mitigation.

The 1991 Court of Appeal decision in *Scott v. Lilloet School District No. 29*[14] established that an employee who is paid throughout the notice period during which she was not required to work has suffered no lost vacation and thus is not entitled to vacation pay accrued during that time. This decision was clarified in the 2001 Court of Appeal decision in *Bavaro v. North American Tea, Coffee & Herbs Trading Co. Inc.* [15] where Mr. Justice Donald, writing for the Court, said as follows:

> [13] On the question of vacation pay and unused sick leave, which according to the letter of employment is to be added to the vacation entitlement, it is now well settled by the *Scott* decision that a wrongfully terminated employee is not entitled to an award for damages equal to vacation pay <u>for the notice period</u> without evidence of loss or expense associated with the lost vacation benefits or a demonstration that the employee actually lost the opportunity to take vacation during that period.
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> [16] With deference, I do not think that in the great majority of cases a discharged employee sees the notice period as anything like a vacation. Either the employee is looking for a new job or has found one and must report for work. The prospect of taking a vacation is likely not even a consideration. The employee cannot predict when a new job will come along and there is no guarantee that the employee will find a new job before the notice period expires. If his or her dismissal has resulted in a lawsuit, the employee does not know when it will be resolved or what the outcome will be. Also, with no money coming in, the expense of taking a vacation may seem imprudent, even if the employee has savings to draw on for that purpose. The uncertainties faced by the employee, when appreciated from the employee's angle of vision, tend to contradict the notion of the notice period as a time of worry-free leisure.

Madam Justice Harris concludes that vacation entitlement that accrues during the notice period may be compensable if the employee demonstrates that he has lost the opportunity to take a

[14] (1991), 60 B.C.L.R. (2d) 273
[15] 2001 BCCA 149

vacation during that period. She does not award this to Mr. Liboiron, noting that he took a planned vacation during the notice period which demonstrated that he was not deprived of the opportunity or ability to take vacation.

With respect to the pension benefits, Mr. Liboiron claimed that he was entitled to an amount equivalent to 6% of his salary which the employer otherwise would have contributed to his pension plan during the notice period. The employer opposed this, suggesting that the pension contributions should only be awarded if the plaintiff actually paid to replace the benefits. Madam Justice Harris rejected this argument and awarded the 6% during the period of notice, noting that the plaintiff had suffered a loss due to the failure of the employer to make the pension contributions during the period of notice.

This decision also dealt with mitigation and provided a good summary of the principles applicable to mitigation in an employment law context. Those principles include the following:

1. A person who has been wrongfully dismissed has a duty to seek to mitigate his or her losses through obtaining equivalent alternative employment.[16]
2. The plaintiff does not owe the duty to mitigate to the defendant. Rather it is a "duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests – to maintain his income and his position in his industry, trade or profession.[17]
3. The burden of proving that the employee has failed to mitigate his losses rests with the employer. [18]
4. There is a heavy onus to demonstrate a failure to mitigate.[19]
5. The defendant must show not only that the plaintiff failed to take steps to mitigate but also that had the plaintiff taken those steps he could likely have found equivalent employment.[20]

After reviewing the steps taken by Mr. Liboiron to find alternative employment, Madam Justice Harris found that he had satisfied his duty to mitigate and that the lack of response from employers contacted by him supports the difficulties facing a person of his age, experience and qualifications in finding equivalent work. She also highlighted the importance of assessing his efforts to find work with regard to his particular circumstances. Finally she noted that the lack of a true reference letter contributed to the difficulties faced by Mr. Liboiron in finding replacement employment.

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[16] *Bates v. John Bishop Jewellers Limited,* 2009 BCSC 158
[17] *Forshaw v. Aluminex Extrusions Ltd.* (1989), 39 B.C.L.R. (2d) 140 at 144 (C.A.)
[18] *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386 (S.C.C.)
[19] *Peterson v. Labatt Breweries of British Columbia* (1996) 25 C.C.E.L. (2d) 241
[20] *Jorgenson v. Jack Cewe Ltd.,* (1978), 93 D.L.R. (3d) 464, {1979} 1 A.C.W.S. 138 and *Munana v. MacMillan Bloedel Ltd.,* [1977] 2 A.C.W.S. 364 (at para. 10)