

Prinzo v. Baycrest Centre for Geriatric Care

**[Indexed as: Prinzo v. Baycrest Centre fo
Geriatric Care]**

60 O.R. (3d) 474
[2002] O.J. No. 2712
Docket No. C34071

**Court of Appeal for Ontario,
McMurtry C.J.O., Weiler and Charron J.J.A.**

July 9, 2002

Employment — Wrongful dismissal — Damages — Intentional infliction of mental harm — Damages for mental distress may be awarded in employment context provided that employer's acts constitute independent actionable wrong — Employer gave employee notice that her position would be eliminated at some uncertain future date — Employee suffered work-related injury and was unable to work — Employer contacted employee persistently to urge her to return to work to perform modified duties — Employer implied that employee's doctor had agreed to her return to work when he had not in fact done so — Employer advised employee that failure to return to work would constitute work refusal — Employer aware that employee suffered emotional upset and anxiety as result of calls — Employee experienced increased blood pressure, weight gain and exacerbation of diabetes symptoms as result of employer's conduct — Employee entitled to damages in amount of \$15,000 for intentional infliction of mental suffering.

Employment — Wrongful dismissal — Damages — Punitive damages — Employer caused employee anxiety and emotional upset by contacting her persistently when she was off work as result of work-related injury and urging her to return to work to perform modified duties — Employer persisted in this conduct despite awareness of effect that conduct had on employee — Trial judge awarded employee damages for mental distress in employee's wrongful dismissal action — Trial judge erred in also awarding punitive damages for harassment of employee — That conduct had already been compensated by award of damages for mental distress.

Employment — Wrongful dismissal — Notice — Notice of termination — Termination letter which stated that employment was to end on date to be determined in future discussions did not constitute effective notice of termination.

Employment — Wrongful dismissal — Reasonable notice — Employee worked for employer for 17 years as manager of beauty shop — Employee performed hands-on hairdressing work as well as managerial functions — Trial judge erred in fixing reasonable notice period at 18 months — Trial judge erroneously took employer's reasons for eliminating employee's position into account in determining length of notice

— Trial judge failed to take into account fact that employee knew that her employment would soon end well before she received official notice — Reasonable notice period was 12 months. [page475]

The plaintiff was employed by the defendant for 17 1/2 years as the manager of the defendant's beauty shop. In November 1997, she received a "Letter of Layoff" indicating that her position was being eliminated because of financial constraints and stating that the effective date for elimination of the position would be determined over the next few weeks. Shortly before receiving this letter, the plaintiff had suffered injuries in a slip and fall in the defendant's parking lot. She was off work until February 1998 and was unfit for any form of work during this period. Throughout this period, the defendant persistently urged the plaintiff to return to work, at one point falsely implying that the plaintiff's doctor had agreed that she was fit for work. The plaintiff's lawyer wrote a letter to the defendant describing the stress and anxiety which the defendant's conduct was causing the plaintiff and requesting that all communications be directed to him until further notice. The defendant continued to contact the plaintiff directly. On the day of the plaintiff's return to work, four representatives of the defendant met with the plaintiff alone for over two hours and, over the plaintiff's protest that she was in no condition to address the subject, insisted on talking about termination. The plaintiff did not receive formal notice of termination until March 11, 1998, when she was given a letter indicating that her last day of employment would be March 31, 1998. The plaintiff brought an action for damages for wrongful dismissal. The trial judge allowed the action, holding that the appropriate notice period was 18 months and that the plaintiff was given notice of termination in November 1997 when she received the "Letter of Layoff". The trial judge awarded the plaintiff aggravated damages in the amount of \$15,000 for mental distress and punitive damages of \$5,000. Costs were awarded to the plaintiff on a solicitor-and-client basis. The defendant appealed. The plaintiff cross-appealed the starting date of the notice period and sought an increase in the award of punitive damages.

Held, the appeal and the cross-appeal should be allowed in part.

Notice of termination must lead a reasonable person to conclude that his or her employment is at an end as of some date certain in the future. The Letter of Layoff of November 1997 did not provide a date certain when the plaintiff's position would be eliminated. Given the trial judge's finding that notice of termination was not clear and unequivocal, and having regard to the fact that a date certain for termination was not given until March 11, 1998, the trial judge erred in concluding that the effective date for notice of termination was November 1997. The effective date for notice of termination was March 11, 1998.

The trial judge drew an inference that the desire to get rid of a troublesome employee was a much greater motivating factor in the decision to terminate the plaintiff's employment than the need to cut costs. He took that factor into consideration in concluding that the reasonable notice period was 18 months. He erred in doing so. The defendant's reason for eliminating the plaintiff's position was not a relevant consideration in determining the length of notice. Moreover, the fact that the plaintiff knew well before

March 11 that her employment would soon end was a consideration affecting the length of notice. A reasonable notice period in the circumstances was 12 months.

Any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination must be founded on separately actionable conduct. Damages for mental distress may be awarded in the employment context, provided that the employer's acts constitute an independent actionable wrong. The trial judge correctly found that there was a separately actionable wrong in this case, the tort of intentional infliction of mental suffering. The elements of that tort are: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and probable illness. The trial [page476] judge found that the acts of harassment by the employees of the defendant were so extreme and insensitive that they constituted a reckless and wanton disregard for the plaintiff's health. The defendant's conduct was flagrant and outrageous. It was also calculated to produce harm. For conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow. The trial judge found that the defendant's employees were well aware of the physical and emotional health of the plaintiff and realized the detrimental effect their harassment would have on her, yet they persisted in that harassment with almost sadistic resolve. Lastly, there was evidence of a visible and provable illness caused by the defendant's actions. The trial judge had before him the evidence of the plaintiff's doctor that the conduct of the defendant's employees caused her emotional upset, increased her blood pressure, resulted in significant weight gain and increased her diabetes symptoms. It would have been preferable if the trial judge had not characterized his award of damages for mental suffering as aggravated damages. The damages did not arise from the dismissal itself, but rather from the defendant's conduct before the dismissal. However, the award of \$15,000 for intentional infliction of mental suffering was appropriate.

The trial judge gave no reason for his award of punitive damages in addition to his award of damages for mental distress. The misconduct found against the defendant was its harassment of the plaintiff constituting the tort of intentional infliction of mental suffering. That conduct had already been compensated by the award of damages for mental distress. Punishment in the form of an award of punitive damages was not necessary for deterrence purposes. The award of punitive damages served no rational purpose.

The trial judge provided no reasons for awarding the plaintiff solicitor-and-client costs. As a general rule solicitor-and-client costs are awarded on very rare occasions such as when a party has displayed outrageous conduct during the proceedings. On occasion, reasons of public interest may also justify the making of such an order. Costs on a solicitor-and-client scale are not to be awarded as damages. They are awarded to mark the court's disapproval of the conduct of a party during the litigation. The trial judge erred in awarding solicitor-and-client costs because there was no basis in the record for such an award.

Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, 123 Man. R. (2d) 1, 152 D.L.R. (4th) 1, 219 N.R. 161, 159 W.A.C. 1, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 97 C.L.L.C. 210-029, 3 C.B.R. (4th) 1, revg (1995), 102 Man. R. (2d) 161, 93 W.A.C. 161, [1995] 9 W.W.R. 153, 34 C.B.R. (3d) 153, 14 C.C.E.L. (2d) 41, 95 C.L.L.C. 210-046 (C.A.), supp. reasons (1995), 107 Man. R. (2d) 227, 109 W.A.C. 227 (C.A.), *apld*

Cases referred to

Ahmad v. Procter & Gamble Inc. (1991), 1 O.R. (3d) 491, 44 O.A.C. 338, 77 D.L.R. (4th) 515, 34 C.C.E.L. 1, 91 C.L.L.C. 14,008 (C.A.), affg (1987), 18 C.C.E.L. 124 (Ont. H.C.J.); Antonacci v. Great Atlantic & Pacific Co. of Canada (2000), 181 D.L.R. (4th) 577, 48 C.C.E.L. (2d) 294, 2000 C.L.L.C. 210-010 (Ont. C.A.), supp. reasons (2000), 181 D.L.R. (4th) 577, 48 C.C.E.L. (2d) 294n (Ont. C.A.), revg in part (1998), 35 C.C.E.L. (2d) 1, 98 C.L.L.C. 210-017 (Ont. Gen. Div.); Bardal v. The Globe & Mail Ltd. (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.); Bogden v. Purolater Courier Ltd., [1996] A.J. No. 289 (Q.B.); Boothman v. R., [1993] 3 F.C. 381, 49 C.C.E.L. 109 (T.D.) (sub nom. Boothman v. Canada); Clark v. Canada, [1994] 3 F.C. 323, 76 F.T.R. 241, 3 C.C.E.L. (2d) 172, 20 C.C.L.T. (2d) 241 (T.D.); [page477] Cronk v. Canadian General Insurance Co. (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147, 23 B.L.R. (2d) 70, 14 C.C.E.L. (2d) 1, 95 C.L.L.C. 210-038 (C.A.), revg (1994), 19 O.R. (3d) 515, 6 C.C.E.L. (2d) 15, 94 C.L.L.C. 14,032 (Gen. Div.); Farley v. Skinner, [2001] 4 All E.R. 801 (H.L.); Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (C.A.), revg (1977), 3 C.P.C. 16 (Ont. S.C.); Frame v. Smith, [1987] 2 S.C.R. 99, 23 O.A.C. 84, 42 D.L.R. (4th) 81, 78 N.R. 40, 42 C.C.L.T. 1, 9 R.F.L. (3d) 225; Friends of Oldman River Society v. Canada (Minister of Transport) (1992), 48 F.T.R. 160n, [1992] 1 S.C.R. 3, 84 Alta. L.R. (2d) 129, 88 D.L.R. (4th) 1, 132 N.R. 321, [1992] 2 W.W.R. 193; Gibb v. Novacorp International Consulting Inc. (1990), 48 B.C.L.R. (2d) 28 (C.A.), affg (1989), 24 C.P.R. (3d) 533 (B.C.S.C.) (sub nom. Woodlock v. Novacorp Intl. Consulting Inc.); Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865n, 126 D.L.R. (4th) 129, 184 N.R. 1, 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89; Housen v. Nikolaisen, 2002 SCC 33, 219 Sask. R. 1, 211 D.L.R. (4th) 577, 286 N.R. 1, 272 W.A.C. 1, 10 C.C.L.T. (3d) 157; MacAlpine v. Stratford General Hospital (1998), 38 C.C.E.L. (2d) 1, 98 C.L.L.C. 210-030 (Ont. C.A.), revg in part (1995), 11 C.C.E.L. (2d) 324 (Ont. Gen. Div.); Mackin v. New Brunswick (Minister of Finance; Rice v. New Brunswick, 2002 SCC 13; Marshall v. Watson Wyatt & Co. (2002), 57 O.R. (3d) 813, 209 D.L.R. (4th) 411, 2002 C.L.L.C. 210-019, 16 C.C.E.L. (3d) 162 (C.A.); McKinley v. BC Tel, [2001] 2 S.C.R. 161, 91 B.C.L.R. (3d) 1, 200 D.L.R. (4th) 385, 271 N.R. 16, [2001] 8 W.W.R. 199, 2001 C.L.L.C. 210-027, 9 C.C.E.L. (3d) 167; Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 40 C.C.E.L. (2d) 1, 99 C.L.L.C. 210-013 (C.A.), affg (1997), 30 C.C.E.L. (2d) 123 (Ont. Gen. Div.); Mortimer v. Cameron (1994), 17 O.R. (3d) 1, 111 D.L.R. (4th) 428, 1 L.W.R. 57, 19 M.P.L.R. (2d) 286 (C.A.) [Leave to appeal to S.C.C. refused (1994), 19 O.R. (3d) xvi, 23 M.P.L.R. (2d) 314, 178 N.R. 146n], revg in part (1992), 9 M.P.L.R. (2d) 185 (Ont. Gen. Div.); Noseworthy v. Riverside Pontiac-Buick Ltd. (1998), 168 D.L.R. (4th) 629, 39 C.C.E.L. (2d) 37 (Ont. C.A.), revg (1996) 22 C.C.E.L. (2d) 183 (Ont. Gen. Div.); Rahemtulla v. Vanfed Credit Union (1984), 51 B.C.L.R. 200, [1984] 3 W.W.R. 296, 4 C.C.E.L. 170, 29 C.C.L.T. 78 (S.C.);

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd., 2002 SCC 19, 98 Alta. L.R. (3d) 1, 209 D.L.R. (4th) 318, 283 N.R. 233, [2002] 5 W.W.R. 193, 20 B.L.R. (3d) 1; Timmermans v. Buelow (1984), 38 C.C.L.T. 136 (Ont. H.C.J.); Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085, 36 B.C.L.R. (2d) 273, 58 D.L.R. (4th) 193, 94 N.R. 321, [1989] 4 W.W.R. 218, 42 B.L.R. 111, 25 C.C.E.L. 81, 90 C.L.L.C. 14,035; Whiten v. Pilot Insurance Co., 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, [2002] I.L.R. 7340, 20 B.L.R. (3d) 165; Wilkinson v. Downton, [1897] 2 Q.B. 57, [1895-7] All E.R. Rep. 267, 66 L.J.Q.B. 493, 76 L.T. 493, 45 W.R. 525, 13 T.L.R. 388, 41 Sol. Jo. 493; Young v. Young, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 108 D.L.R. (4th) 193, 160 N.R. 1, [1993] 8 W.W.R. 513, 18 C.R.R. (2d) 41, 49 R.F.L. (3d) 117

Statutes referred to

Workers' Compensation Act, R.S.O. 1990, c. W.11
Workplace Safety and Insurance Act, S.O. 1997, c. 16, Sch. A, s. 40(1)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 49.13

Authorities referred to

Ball, S.R., Canadian Employment Law, looseleaf (Aurora, Ont.:

Canada Law Book, 1996)

England G., I. Christie et al., Employment Law in Canada, 3rd ed., looseleaf (Markham, Ont: Butterworths, 1998)

Fleming, J.G., The Law of Torts, 9th ed. (Sydney: LBC Information Services, 1998)

[page478]

Fridman, G.H.L., The Law of Torts in Canada (Toronto: Carswell, 1989)

Klar, L.N., Tort Law, 2nd ed. (Toronto: Carswell, 1996)

Linden, A.M., Canadian Tort Law, 7th ed. (Markham, Ont.:

Butterworths, 2001)

APPEAL and CROSS-APPEAL from a judgment of Dyson J. (2000), 12 C.C.E.L. (3d) 156 (S.C.J.) in an action for damages for wrongful dismissal.

Bernie Romano, for respondent/appellant on the cross-appeal. John C. Field and Amanda Hunter, for appellant/respondent on the cross-appeal.

The judgment of the court was delivered by

WEILER J.A.: —

INTRODUCTION

[1] Baycrest, a geriatric centre in Toronto, appeals from the order that it pay damages for wrongful dismissal, "lieu time", aggravated damages, punitive damages and solicitor-and-client costs to its former employee, Prinzo. Prinzo cross-appeals the starting date of the notice period and seeks an increase in the award of punitive damages.

FACTS

[2] Prinzo worked for Baycrest for 17 1/2 years. She was the manager of the beauty shop and was responsible for the accounting, financing, employees, volunteers who provided services, and the scheduling of appointments. These duties occupied approximately 40 per cent of her time. Sixty per cent of her time involved providing hairstyling services directly to clients. At the time of termination, Prinzo was 49 years old and she earned approximately \$30,500 a year. In addition, she had also accumulated "lieu time". "Lieu time" provides for a period of time when the employee is not required to work but yet is entitled to pay because she has worked extra hours.

[3] Prinzo was considered a model employee, at least until 1996 when Gates, the Director of Food and Nutritional Services, became her immediate supervisor. Gates' appraisal of Prinzo was not as positive as prior appraisals and the latter refused to sign the appraisal Gates had prepared. In January 1997, Gates decided to recommend elimination of Prinzo's position as part of a series of cost-cutting measures and, in October 1997, Baycrest's Board of Directors accepted the recommendation. On November 27, she received a "Letter of Layoff" indicating that her position [page479] was being eliminated because of financial constraints. The letter stated, "The effective date for elimination of the position will be determined in our discussions over the next few weeks."

[4] Prior to this, on November 20, 1997, Prinzo fell and hurt herself in Baycrest's parking lot. In addition to suffering musculoskeletal injuries, she was unable to use her right arm. She missed work the next day, a Friday, but came in the next week and saw Dr. Gratton, a doctor at Baycrest, who referred her to physiotherapy. Prinzo also saw her family doctor, Dr. McNabb, on November 24, 1997. She continued to work on light duties although her pain was increasing.

[5] On November 28, 1997, Prinzo went off work and again saw Dr. McNabb. She arranged an early appointment for her for physiotherapy. Prinzo remained off work until February 9, 1998. Based on the evidence of Dr. McNabb (who had treated her since 1986) and Prinzo's evidence, the trial judge was satisfied that Prinzo was medically unfit for any form of work during this period of time.

[6] Beginning December 4, 1997, Frost, an occupational health nurse, began calling Prinzo to inquire about her ability to return to work. Gates also called urging Prinzo to return to Baycrest to perform modified work. The trial judge found that these calls were extremely upsetting to Prinzo and that Gates was aware that the calls caused Prinzo

emotional distress. The trial judge also found that the calls were harassing and indicated or inferred malingering on the part of Prinzo.

[7] Baycrest took the position it was entitled to communicate with its employee directly as part of its duty to identify suitable employment available and consistent with the employee's functional abilities under s. 40(1)(a) and (b) of the Workplace Safety Insurance Act, S.O. 1997, c. 16, Sch. A ("WSIA"). On December 19, however, Frost told Dr. McNabb that it was necessary for Prinzo to return to work "so that she could be let go". In late December, Baycrest also called an adjudicator under the [WSIA] to assist in implementing a plan for Prinzo to return to work and the trial judge found that officials from this Board would seek information directly from Dr. McNabb.

[8] On December 23, 1997 at 3:00 p.m., Prinzo received a letter from Gates. The letter began, "The Baycrest Occupational Health and Safety Department has recently been in touch with your Doctor". The letter went on to imply Prinzo's doctor had agreed she could return to work. This was false. In fact, Dr. McNabb had indicated that Prinzo was totally disabled. The letter advised that modified duties were available to Prinzo starting December 23. Prinzo ascertained that Dr. McNabb had not [page480] said she could return to work, then telephoned Gates and told her she could not return to work until she was cleared by her family doctor. Gates threatened that, if she did not return to work immediately, this would be a work refusal ". . . and we will address that".

[9] Prinzo's lawyer wrote a letter on January 15, 1998 outlining the stress and anxiety being caused by Baycrest and requested that all communication be directed to him until further notice. The trial judge found that the calls continued notwithstanding the letter.

[10] Baycrest's repeated efforts to have Prinzo return to work led her to leave a telephone message thanking Gates for reinstating her, and her lawyer to send a letter to Baycrest to the effect that it had changed its decision to terminate Prinzo. By way of reply on January 29, Baycrest confirmed the "notice of layoff" and that the effective date of the elimination of the position was to be discussed at a later date.

[11] On February 6, 1998, Prinzo agreed to return to work on February 9. Although Baycrest threatened to discipline Prinzo for not returning to work as of December 23, it did not in fact do so. When Prinzo returned to work, however, a meeting was immediately arranged. Prinzo asked a friend with whom she worked to accompany her. The friend was told to leave. Four persons from Baycrest met with Prinzo alone for over two hours. During the conversation, Mahy, the director of employee services, said he wanted to talk about termination. Prinzo said she was in no condition to discuss termination and only wanted to discuss modified duties. The trial judge found that Mahy said something about being concerned that Prinzo's conduct not cause harm to the residents, and that this statement was most hurtful and upsetting to her. Prinzo repeated this allegation to her friend immediately after the meeting ended.

[12] On March 11, 1998, Gates handed Prinzo a letter indicating that her last day of employment would be March 31, 1998.

[13] Dr. McNabb testified that the manner in which Prinzo was treated caused her emotional upset and increased her blood pressure. Her weight shot up and her diabetes symptoms increased. The trial judge found she also suffered a loss of self-esteem and distress on a disabling basis for months after leaving her position as a result of Baycrest's conduct.

[14] Following her termination, Prinzo went to Italy, then returned to Canada and found a job with the Allstate Insurance Company commencing in October 1998. It paid less than her job with Baycrest. Baycrest paid Prinzo until November 1998. [page481]

ISSUES

[15] The following issues are raised in this appeal:

- (1) The date from which reasonable notice should be calculated;
- (2) The appropriate length of the notice period for calculation of damages and "lieu time";
- (3) Whether damages for mental distress should have been awarded;
- (4) In the alternative, whether the notice period should be extended due to the manner of dismissal;
- (5) Whether punitive damages should have been awarded;
- (6) Whether costs should have been awarded on a solicitor/ client basis.

ANALYSIS

Issue 1: Date From Which Reasonable Notice Should be Calculated

[16] The trial judge held that Prinzo was given notice of termination on November 27, 1997 when she received the letter of "layoff" stating her position was being eliminated and that the effective date for elimination would be determined "over the next few weeks".

[17] Notice of termination need not use the words "you are hereby dismissed effective . . ." or some such equivalent. Notice of termination must, however, lead a reasonable person to conclude that his or her employment is at an end as of some date certain in the future: *Gibb v. Novacorp International Consulting Inc.* (1990), 48 B.C.L.R. (2d) 28 at p. 34 (C.A.). The fact that no effective date of termination is to be found in a letter indicating that employment is shortly to end is a circumstance that may support an inference that the requirement of specific notice has not been met. All of the circumstances must, however, be considered: *Gibb, supra*, at p. 34 B.C.L.R. In *MacAlpine v. Stratford General Hospital* (1998), 38 C.C.E.L. (2d) 1, 98 C.L.L.C. 210-030 (Ont. C.A.) the employee was advised by letter on January 20, 1992 that her position as part-time coordinator at the hospital would become "redundant . . . effective 1992 06 15". That letter made it clear that MacAlpine's position would end June 15, 1992. The issue was whether the invitation to MacAlpine to apply for other jobs detracted from the clarity of the notice given, and this court held that it did not. Notice cannot be assumed to

have been given if an employee is simply warned that *[page482]* his or her job will probably be eliminated "within six months to a year"; notice must be clear and unambiguous: *Ahmad v. Procter & Gamble Inc.* (1991), 1 O.R. (3d) 491, 77 D.L.R. (4th) 515 (C.A.).

[18] Prinzo submits in her cross-appeal that the trial judge erred in choosing the date of November 27, 1997 because Baycrest's notice did not clearly and unequivocally state a date certain when her employment would terminate.

[19] In this case, unlike in *MacAlpine*, *supra*, the letter of November 27 did not provide a date certain when Prinzo's position would be eliminated. Baycrest submits that the notice was nevertheless clear and submits that Prinzo knew her employment would terminate when Baycrest's fiscal year ended on March 31. Consequently Baycrest submits that the trial judge did not err in holding that notice of termination should run from November 27.

[20] The trial judge made no finding that Prinzo knew or ought to have known that her employment would end as of March 31. Nor would the evidence support such a finding. March 31 was not mentioned as the outside date of termination in the letter of November 27 or in the discussion Prinzo had with Gates at that time. What the trial judge did find, however, was that "[c]onsiderable confusion arose as to whether she [Prinzo], in fact, still had a job or not with the defendant [Baycrest] because of how the letter was styled and because of the inordinate lengths the defendant went to attempt to get her back to work while off sick." There is ample support for this finding. While the letter of January 29 confirmed the layoff as being permanent, it too indicated that the effective date of termination was to be arranged, and therefore did not contain a date certain for termination of employment. No one at Baycrest ever gave Prinzo a date certain for termination of her employment until she was given the March 11 letter stating that her last day of employment would be March 31, 1998.

[21] Given the trial judge's finding that notice of termination was not clear and unequivocal, and having regard to the fact that a date certain for termination was not given until March 11, 1998, the trial judge erred in concluding that the effective date for notice of termination was November 27, 1997. Considering all of the circumstances, I would hold that effective date for notice of termination is March 11, 1998.

Issue 2: Appropriate Length of Notice for Calculation of Damages and Lieu Time

[22] The trial judge held that Prinzo was entitled to 18 months' reasonable notice of her dismissal. In doing so, the trial judge did *[page483]* not indicate that he was extending the notice period on account of Baycrest's conduct in dismissing Prinzo.

[23] An appellate court is not justified in interfering with the length of the notice period unless the notice period awarded is unreasonable: *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813, 209 D.L.R. (4th) 411 (C.A.) at para. 19.

[24] Baycrest contends that this court should set aside the 18 months' notice and substitute a period of 12 months. It makes three submissions.

[25] Baycrest's first submission concerning the length of notice is that the trial judge considered irrelevant factors in making his determination. In the portion of his reasons discussing the appropriate notice period, the trial judge discussed the length of Prinzo's employment, her salary and her responsibilities which included hiring and training hairdressers as well as supervising volunteers, and arranging for the purchase of supplies. She had a staff of five, six to ten volunteers, plus students. Mahy described her position as an "entry level supervisory role". The trial judge appears to have rejected this characterization of her employment as he described it as "not helpful". There is nothing in this portion of the trial judge's reasons that indicates he took into consideration irrelevant factors. However, in the portion of the trial judge's reasons entitled, "Background to November 1997", the trial judge reviewed the evidence that, in the spring of 1997, Gates was involved in proposing ways and means of cutting costs and recommended the elimination of Prinzo's position. The trial judge drew an inference that Baycrest's decision to terminate Prinzo was not really for cost-cutting purposes. He stated "the elimination of a troublesome employee to Ms. Gates, under the guise of cost cutting, was a much greater motivating factor than the questionable saving of \$14,000."

[26] An employer may terminate an employee at any time with notice. Prinzo presented no evidence to dispute the reason given for termination, namely, the elimination of her position. Prinzo did not challenge Gates' evidence that the decision to recommend Prinzo's position be eliminated was made prior to any concern about her performance. I agree with Baycrest that its reason for eliminating Prinzo's position was not a relevant consideration in determining the length of notice. The trial judge erred in considering this factor.

[27] Baycrest's second submission is that the trial judge did not give enough consideration to the traditional factors in *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), and the decision of this court in *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505, 128 D.L.R. (4th) 147 (C.A.). [page484] Its third submission in answer to the cross-appeal is that if the letter of November 27, 1997 was not effective notice of termination, this court should nevertheless take into consideration the fact that Prinzo knew, prior to March 11, that her employment would soon end: *Ahmad v. Procter and Gamble Inc.*, supra.

[28] The purpose of requiring an employer to give reasonable notice of termination is to provide the employee with reasonable time to seek alternative employment. In *Cronk*, supra, this court held that a non-managerial employee who had served a company faithfully for 27 years was entitled to notice of 12 months. In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270 (C.A.), however, the court held that *Cronk*, supra, did not create an upper limit of 12 months' notice for non-managerial employees.

[29] Prinzo worked for Baycrest for over 17 years. She did "hands on" work as well as managerial duties, the latter occupying less than half her time. While Prinzo did not know a date certain when her employment would end, she was told in November that her position would be terminated, and the January letter confirmed her termination thereby eliminating any confusion. The fact that Prinzo knew well before March 11 that her employment would soon end is a consideration affecting the length of notice. Having regard to these factors, I would agree with Baycrest that 18 months' notice is unreasonable and that a reasonable notice period would be 12 months.

[30] The trial judge ordered that Prinzo should receive \$774.85 as compensation for so-called "lieu time". My understanding is that Prinzo had worked extra hours and that, with the permission of Baycrest, she would have been entitled to take time off work equivalent to these hours. Baycrest submits that there was no basis upon which to award Prinzo any damages for "lieu time". Baycrest submits that "lieu time" is akin to an attempt to claim vacation time during the notice period as in Cronk, supra, at pp. 514-15 O.R. I disagree. The "lieu time" was earned prior to Prinzo being dismissed and, in the circumstances, I would uphold the trial judge's decision to award her pay in lieu of time off.

[31] In view of Prinzo's duty to mitigate her damages, the amounts earned at Allstate Insurance during this notice period should be deducted.

Issue 3: Damages for Mental Distress

[32] The headings and structure of the trial judge's reasons are as follows. Under the heading, "III. Aggravated Damages for [page485] Mental Distress", the trial judge first sets out the law for aggravated damages, the requirement of a separate cause of action, and the law respecting the tort of intentional infliction of mental suffering. In "IV. Background Prior to November 1997", and "V. Background from November 1997", the trial judge discusses the evidence at trial relating to events before and after November 1997. In "VI. Aggravated Damages", he applies the law to the facts as he has found them and awards Prinzo \$15,000 aggravated damages for mental distress.

[33] The submissions of Baycrest with respect to the award of damages for mental distress are that: (a) the conduct in issue does not amount in law to a separate actionable wrong; (b) the respondent did not plead the conduct required to found such damages; (c) the trial judge erred in his findings of fact and the inference that he drew from those findings that Baycrest committed the tort of intentional infliction of mental suffering.

(a) A separate actionable wrong

The requirement of a separate actionable wrong

[34] In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 73, 152 D.L.R. (4th) 1, the Supreme Court of Canada confirmed the principle, previously enunciated in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193, that any award of damages beyond compensation for breach of contract

for failure to give reasonable notice of termination must be founded on separately actionable conduct. Both the majority and dissenting opinions recognized that the employer-employee relationships are typically characterized by unequal bargaining power and that employees are in a vulnerable position vis-à-vis their employer particularly at the time of dismissal. As a result, the court recognized that the parties to an employment contract are subject to an implied obligation of good faith and fair dealing throughout the employment relationship to and including its termination. However, the majority clearly rejected the argument that a breach of the employer's duty of good faith to the employee at the time of dismissal, by being untruthful or by being unduly insensitive in the manner of dismissal, constituted an independent actionable wrong. This is in contrast to *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, 209 D.L.R. (4th) 257, where, at para. 79, the court held that an insurance company's breach of the duty of good faith in refusing to pay a claim did amount to a contractual breach, independent of the breach of contractual duty to [page486] pay the claim, and could therefore ground an award for punitive damages. Although in both cases there is often an inequality of bargaining power, the court's holding in *Whiten*, supra, was based on the fact that peace of mind is the very essence of an insurance contract: para. 129. By contrast, in *Wallace*, supra, at para. 73, the court held that "[a]n employment contract is not one in which peace of mind is the very matter contracted for." [See Note 1 at end of document]

[35] Iacobucci J. for the majority of the court in *Wallace*, supra, also rejected the creation of the tort of "bad faith discharge" on the basis that creation of such a tort was best left to individual legislatures. Instead, the majority held that the notice period could be extended if, in dismissing the employee, the employer engaged in conduct that was unfair or in bad faith.

[36] In *Wallace*, supra, the trial judge did not award damages based on the tort of intentional infliction of mental suffering, but awarded aggravated damages for mental distress based on breach of an implied term in the contract that the employee would not be dismissed without cause. The trial judge found that, having been given such assurance, it would have been in the contemplation of the employer that *Wallace* would suffer mental distress if that term were violated. The trial judge also found that the employer's actions in maintaining that it had cause for dismissal (a position it held until trial) amounted to a negligent breach of duty of care, warranting compensation by way of aggravated damages. The trial judge found that it was reasonably foreseeable that mental distress would result from these actions. The Supreme Court of Canada, at para. 74, upheld the Manitoba Court of Appeal's finding that there was insufficient evidence to support a finding that the actions of the employer constituted a separate actionable wrong either in tort or in contract. Scott C.J.M. for the Court of Appeal [(1995), 102 Man. R. (2d) 161, 34 C.B.R. (3d) 153]) had written at p. 184 Man. R.: "His [the trial judge's] conclusion that there was a 'negligent breach of the duty of care warranting compensation by way of aggravated damages' cannot stand since there was no finding, and no evidence to support one, that the actions of UGG were such as to constitute an independent cause of action." Iacobucci J., for the majority, wrote at para. 73 that in the absence of such an independent actionable [page487] wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence.

[37] Following Wallace, supra, the possibility of awarding damages for mental distress in the employment context remains, provided that the employer's acts constitute an independent actionable wrong. See Noseworthy v. Riverside Pontiac Buick Ltd. (1996), 22 C.C.E.L. (2d) 183 (Ont. Gen. Div.), revd (1998), 168 D.L.R. (4th) 629, 39 C.C.E.L. (2d) 37 (Ont. C.A.) at paras. 12 and 13, per Goudge J.A. In Noseworthy, the employee was fired on the basis of allegations that he forged signatures on cheques. The trial judge found that the false allegations of forgery against the plaintiff and the threat of criminal charges unless he resigned were an attempt by the employer to avoid giving adequate notice of termination of employment. After setting out his findings, the trial judge's analysis for awarding aggravated damages for mental distress consisted of the following, at para. 19:

The defendants' treatment of the plaintiff was high-handed, repulsive and unacceptable by any standard of decency. Under these circumstances, bearing in mind the harm or injury inflicted (for monetary gain) on the plaintiff, I have concluded that the facts herein warrant an award for aggravated damages, for mental distress and for punitive damages in answer to questions 2 and 3 raised herein.

[38] It is in this context that Goudge J.A. for the Court of Appeal wrote at para. 14 that "[t]here is nothing in the record before us to suggest that the manner of dismissal was an independent actionable wrong by the corporate defendant nor was this argued by the plaintiff." Consequently, he held that the trial judge erred in awarding aggravated and punitive damages. In accordance with Wallace, supra, the notice period was extended. The trial judge also assessed damages for mental distress against two of the individual defendants but not against the corporate defendant. The trial judge's reasons did not indicate the basis on which this was done. On appeal, it was argued that the basis for the award was the tort of intentional infliction of mental suffering. Considering the requirements of the tort of intentional infliction of mental distress, Goudge J.A. wrote at para. 20 that "[e]ven if this cause of action is available in the employment context, in this case the purpose of the defendants' actions in effecting the dismissal was to avoid providing reasonable notice to the plaintiff. This falls short of the requisite intention for liability to be sustained on this basis."

[39] Most recently, in McKinley v. BC Tel, [2001] 2 S.C.R. 161, 200 D.L.R. (4th) 385, Iacobucci J. dealt with the question of whether the trial judge was correct in leaving the question of aggravated damages for mental distress to the jury in an *[page488]* employment law case. At para. 79, Iacobucci J. observed that the majority in Wallace, supra, recognized that aggravated damages could be awarded for mental distress flowing from a wrongful dismissal. He went on to hold that, according to Wallace, supra, the proper threshold for allowing the issue of damages for mental distress to be determined by a jury is whether there is sufficient evidence of a separately actionable wrong. On the facts in McKinley, supra, Iacobucci J. held at para. 82 that, ". . . a fair reading of the evidence does not . . . suggest that the [employers] acted with an intention to harm the [employee] either by deliberately inflicting mental distress or by acting in a discriminatory manner."

[40] With this background in mind, I turn to the requirements of the tort of intentional infliction of mental suffering.

The tort of intentional infliction of mental suffering

[41] The tort of intentional infliction of mental suffering is widely recognized as deriving from the tort in *Wilkinson v. Downton*, [1897] 2 Q.B. 57, [1895-7] All E.R. Rep. 267. In that case, as a practical joke, the defendant told the plaintiff that her husband had been in an accident and had broken both of his legs. As a consequence of the shock of hearing this distressing news, the plaintiff became seriously ill. As indicated by Lewis Klar, *Tort Law*, 2nd ed. (Toronto: Carswell, 1996) at p. 62, in awarding damages for the infliction of nervous shock, the judgment in *Wilkinson v. Downton*, supra, created a new tort, the essential ingredients of which can be derived from the statement of Wright J. at pp. 58-59 Q.B.:

The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff -- that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

[42] Wilson J. recognized the existence of the tort of intentional infliction of mental suffering at para. 46 of her dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 C.C.L.T. 1, although she would not have extended the tort to disputes respecting custody and access as this would not be in the best interests of the children.

[43] In *Rahemtulla v. Vanfed Credit Union*, [1984] 3 W.W.R. 296, 29 C.C.L.T. 78 (B.C.S.C.), McLachlin J. (as she then was) addressed the question of the availability of the tort of intentional infliction of mental suffering in the context of a plaintiff who was dismissed from her position as teller as a result of unfounded allegations of theft. She suffered severe emotional distress as a consequence of her summary dismissal and the [page489] accusations of the defendant. McLachlin J. reviewed the jurisprudence relating to damages for mental distress arising from breach of contract, and tort. She held that a claim in contract could not succeed, as the mental distress suffered by the plaintiff did not arise from the breach, i.e. the failure to give adequate notice. McLachlin J. at paras. 52-56 then set out the elements of the tort of intentional infliction of mental suffering: (1) conduct that is flagrant and outrageous, (2) calculated to produce harm (3) resulting in a visible and provable injury.

[44] Applying these requirements to the facts before her, McLachlin J. held that the accusation of theft, even if motivated by a desire to extort a confession and solve the mystery of the missing funds, amounted to an act with reckless disregard as to whether or not shock would ensue from the accusation. She emphasized that there was no requirement of malicious purpose to cause the harm or any motive of spite. McLachlin J.

considered [at p. 95 C.C.L.T.] that the employer's conduct met the requirement of "outrageousness":

While the financial institution has the right to dismiss a suspect employee without investigation, the proper conduct of its affairs does not require that it be given the right to make reckless and very possibly untruthful accusations as to the employee's honesty which will foreseeably inflict shock and mental suffering. Considering all these circumstances, I am satisfied that Mr. Flack's conduct can fairly be described as flagrant and outrageous.

[45] With respect to the requirement that the conduct be calculated to produce harm, McLachlin J. found at para. 55 that this requirement was met on the basis that "[i]t was clearly foreseeable that the accusations of theft which the defendant made against the plaintiff would cause her profound distress." It appears that the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow: Linden, Canadian Tort Law, 7th ed. (Markham, Ont.: Butterworths, 2001) at p. 34; Klar, supra, at p. 29; Fridman, The Law of Torts in Canada (Toronto: Carswell, 1989) at p. 53.

[46] Concerning the requirement of a "visible and provable illness" it appears that the absence of a medical expert will not necessarily be fatal. In Rahemtulla, supra, McLachlin J. wrote at para. 56: "Notwithstanding the absence of expert medical evidence, I am satisfied that the plaintiff suffered depression accompanied by symptoms of physical illness as a result of Mr. Flack's [her employer's] accusations."

[47] In the employment law context, damages for mental distress arising from the tort of intentional infliction of mental suffering *[page490]* have also been awarded where, for example, an employee was severely harassed by a superior who had knowledge of her fragile mental state (Boothman v. R., [1993] 3 F.C. 381, 49 C.C.E.L. 109 (T.D.)); an employee suffered sexual harassment from her colleagues and supervisors (Clark v. Canada, [1994] 3 F.C. 323, 76 F.T.R. 241 (T.D.)); and where an employee was subjected to a confrontational, brash and contradictory management style (Bogden v. Purolator Courier Ltd., [1996] A.J. No. 289 (Q.B.)).

[48] A review of the case-law and the commentators [See Note 2 at end of document] confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness. The trial judge did not err in his conclusion that the tort of intentional infliction of mental distress is a separately actionable wrong.

(b) The pleadings

[49] Baycrest submits that Prinzo did not plead a separate actionable wrong in her statement of claim. I do not agree.

[50] In her statement of claim, Prinzo claimed "damages for mental distress" at the outset. After setting out the history of the conduct in issue, para. 17 states: "Iole Prinzo's family doctor advised The Baycrest Centre that their conduct was adversely affecting Iole Prinzo's health but they failed or refused to heed those warnings and continued to attempt to coerce Iole Prinzo to return to work so that her position could be terminated as aforesaid."

[51] Baycrest's statement of defence asserts at para. 30:

"The Defendant denies any action on its part or on behalf of its officers, employees or agents, to willfully inflict mental distress upon the Plaintiff."

[52] The pleadings indicate that Baycrest was aware that wilful conduct on its part injurious to Prinzo's mental health was being asserted. At para. 30 of its statement of defence, Baycrest also pled: "The Defendant states, in any event, that the basis for the claim for mental distress as pleaded by the Plaintiff does not provide sufficient nexus to the termination of the Plaintiff's employment to support, as a matter of law, damages for mental **[page491]** distress flowing from a wrongful termination" (emphasis added). Baycrest's pleading that the conduct causing mental distress did not have a sufficient nexus to Prinzo's termination only supports the assertion that conduct separate from wrongful termination of employment was pleaded.

[53] Baycrest was not taken by surprise by the pleading. This is not a case like *Antonacci v. Great Atlantic & Pacific Co. of Canada* (2000), 48 C.C.E.L. (2d) 294, 181 D.L.R. (4th) 577 (Ont. C.A.), where it was only upon reading the trial judge's reasons for decision that the basis for the claim for aggravated damages became apparent. In this case, the conduct in issue was pleaded and submissions concerning it were made at trial. I conclude that aggravated damages for intentional infliction of mental suffering was adequately pleaded.

(c) Findings and inferences of the trial judge

[54] The trial judge specifically addressed the question of a separate actionable wrong. He noted that aggravated damages were damages in addition to the damages awarded as compensation for breach of the employer's contractual duty to give proper notice. The trial judge then talked about compensation flowing not from the fact of dismissal itself but from the manner of dismissal, and indicated that intangible injuries caused by bad faith are sufficient to merit compensation, while acts of bad faith on the part of the employer not sufficient to form a separate cause of action might extend a conventional period of notice. These latter comments describe the "Wallace factor". While these comments are somewhat confusing, as they occur during a discussion of aggravated damages, the trial judge probably intended to contrast damages for mental distress with the "Wallace factor". The last two paragraphs of the trial judge's discussion of the law are, however, clear. He stated [at paras. 21-22]:

There is no doubt that an action will lie for willful infliction of injury, or the

reckless disregard as to whether injury will ensue from an act committed. See *Abramzik v. Brenner* (1967), 62 W.W.R. 332 (Sask. C.A.).

In this case, certain acts of harassment by the employees of the defendant were so extreme and insensitive that they constituted a reckless and wanton disregard for the health of the plaintiff and, therefore, would provide a basis for a separate cause of action. See *Wilkinson v. Downton*, [1897] 2 Q.B. 57 (Eng. Q.B.); *Timmermans v. Buelow* (1984), 38 C.C.L.T. 136 (Ont. H.C.); *Boothman v. R.* (1993), 49 C.C.E.L. 109 (Fed. T.D.); *Clark v. Canada* (1994), 20 C.C.L.T. (2d) 241 (Fed. T.D.).

[55] Baycrest submits that its conduct did not amount to a separate actionable wrong but that, on the contrary, its conduct was lawful. *[page492]*

[56] The main findings of the trial judge that led to his conclusion that Baycrest's conduct met the requirements for an independent wrong are to be found in his discussion of the evidence from November 1997 onwards and may be summarized as follows:

- Prinzo was medically unfit for any form of work from November 27 to February 9, including so-called modified duties and was not malingering;
- Gates and Frost kept calling Prinzo urging her to return to perform modified duties;
- Frost told Dr. McNabb that Prinzo had to be brought back to work so she could be let go;
- Gates sent Prinzo a letter dated December 22, 1997 that implied that Prinzo's doctor had agreed to her return to work when this was not the case;
- Gates advised Prinzo that a refusal to perform modified work as of December 23, 1997 was a work refusal;
- The emotional upset to Prinzo as a result of the calls was or ought to have been apparent to the callers. In the portion of his reasons entitled "Background to November, 1997" the trial judge reviewed the evidence that in the spring of 1997 Prinzo was off sick and Gates called her several times. The staff at Baycrest became aware that the calls were emotionally upsetting to Prinzo. When Prinzo re-injured herself in November 1997 and Gates again began calling, Prinzo's lawyer in a letter of January 15, 1998 outlined the stress and anxiety that was being caused, and requested that all communication be directed to him. The trial judge held that the calls continued after the letter.
- At the request of Baycrest, the Workplace Safety and Insurance Board became involved in early January. The Board would seek information from Prinzo's doctor as to her ability to return to work. Although there was no need for Baycrest's staff to contact Prinzo directly once the Board was engaged, the trial judge found that the calls did not cease.
- Baycrest's obligations respecting the WSIA did not include exacerbating Prinzo's fragile health by harassment.

[57] Recently, in *Housen v. Nikolaisen*, 2002 SCC 33, 211 D.L.R. (4th) 577, the Supreme Court held that the same degree of [page493] deference must be paid to a trial judge's inferences of fact as are afforded to findings of fact. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge. As stated at para. 21, it is "whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard". All factual conclusions are inextricably linked with assigning weight to evidence and thus attract a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge has relied on to draw an inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

[58] Baycrest challenges the trial judge's factual conclusions. In my opinion, the trial judge's factual findings set out above disclose no palpable and overriding error.

[59] Baycrest also seeks to excuse its conduct on the basis that it was consistent with Baycrest's rights and obligations as an employer under the WSIA or its predecessor, the Workers' Compensation Act, R.S.O. 1990, c. W.11. Section 40(1)(a) of the WSIA requires the employer to contact the employee as soon as possible after an injury has occurred and to maintain contact with a view to ensuring the employee's early return to work. Not all of Baycrest's conduct falls within the scope of "duty" under the WSIA or its predecessor. During oral argument Baycrest was forced to concede that the letter of December 23 falsely implying that Prinzo's physician had authorized her immediate return to work did not fall within s. 40(1)(a). Nor was Baycrest entitled, in its phone call following the letter, to threaten Prinzo that if she did not return to work immediately this would be considered a work refusal which would be "dealt with". Furthermore, the fact that individual calls in and of themselves may fall within s. 40(1)(a) does not mean that the cumulative effect of the conduct was not tortious. The trial judge committed no palpable and overriding error in rejecting Baycrest's submission that it was merely complying with its statutory duty.

[60] In his review of the evidence the trial judge made express factual findings with respect to each of the required elements of the tort of intentional infliction of mental suffering. He held [at para. 22] that the ". . . acts of harassment by the employees of the defendant [Baycrest] were so extreme and insensitive that they constituted a reckless and wanton disregard for the health of the plaintiff [Prinzo]." This characterization of the conduct of the Baycrest employees, and the trial judge's hyperbolic reference elsewhere to their "almost sadistic resolve" in persisting with the [page494] harassment, make it clear that, like in *Rahemtulla*, supra, the conduct may fairly be described as flagrant and outrageous, meeting the first element of the tort.

[61] The trial judge also made findings relating to the second required element, that the conduct be calculated to produce harm. As indicated above, for the conduct to be calculated to produce harm, either the actor must desire to produce the consequences that follow, or the consequences must be known by the actor to be substantially certain to follow. The trial judge found that Baycrest's employees "were well aware of the physical

and emotional health of the plaintiff and would realize the detrimental effect their harassment would have on the plaintiff and yet they persisted [in] such harassment with almost sadistic resolve". As indicated in *Wilkinson v. Downton*, supra, [at p. 59 Q.B.] "it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs." There is some similarity to the facts of *Timmermans v. Buelow* (1984), 38 C.C.L.T. 136 (Ont. H.C.J.), where Catzman J. (as he then was) awarded a tenant damages for mental distress arising out of his landlord's threatening and harassing eviction letters, based in part on the landlord's knowledge of the plaintiff's fragile emotional state.

[62] Lastly, there must be evidence of a visible and provable illness caused by the defendant's actions. In addition to the evidence from Prinzo herself as to the emotional distress caused by the appellant's actions, the trial judge had before him the evidence of Dr. McNabb that the conduct of the Baycrest employees caused her emotional upset, increased her blood pressure, resulted in significant weight gain, and increased her diabetes symptoms. The conduct here did not merely result in temporary and transient upset of mere injury to feelings. Rather, the emotional distress was such that it was manifested in physical illness documented by a physician. The trial judge expressly found that the conduct by the employer met the requirements of the tort of intentional infliction of harm. In awarding damages for the tort of intentional infliction of harm, the trial judge characterized these damages as aggravated damages. In *McKinley*, supra, the Supreme Court discussed the issue of aggravated damages at para. 78 as follows:

D. Aggravated Damages

The key principles for establishing the circumstances in which aggravated damages in wrongful dismissal actions may be awarded were set out by this Court in *Wallace* and in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085. In *Vorvis*, McIntyre J. (writing for the majority) highlighted that, unlike punitive damages, aggravated damages serve the purpose of compensation for intangible injuries. He stated that such damages could be awarded where: (1) an employer's conduct was "independently actionable"; [page495] (2) it amounted to a wrong that was separate from the breach of contract for failure to give reasonable notice of termination; and (3) it arises from the dismissal itself, rather than the employer's conduct before or after the dismissal (pp. 1103-4).

[63] Unlike the situation in *Wallace*, supra, *Noseworthy*, supra, and *McKinley*, supra, the evidence led at trial does provide a basis for the trial judge's finding that Baycrest engaged in the tort of intentional infliction of mental suffering, an independent cause of action. The damages are not, however, aggravated damages in the sense that they did not arise from the dismissal itself but rather the employer's conduct before the dismissal. (On the facts as found by the trial judge, the tort would have been committed after dismissal.) Indeed, at para. 77 of its factum, Baycrest acknowledges that "[n]one of the incidents remarked on by the trial judge arose at the time of the Respondent's termination." This is

a classic case of damages for a tort that was committed prior to dismissal. It would have been preferable if the trial judge had not characterized his award as aggravated damages.

[64] Having regard to the findings of the trial judge and his conclusion that a separate actionable wrong existed because the elements of the tort of intentional infliction of mental suffering were present, I would uphold the award of \$15,000 for intentional infliction of harm.

Issue 4: In the Alternative -- The "Wallace Factor" and Mitigation

[65] In argument before us, counsel for Prinzo submitted in the alternative, that if the actions of Baycrest were not a separate actionable wrong, then the appropriate length of notice should be extended six months based on the "Wallace factor" -- amounting to the equivalent of what she received for aggravated damages for mental distress.

[66] As I have upheld the trial judge's conclusion that the actions of Baycrest do constitute an independent actionable wrong I need not address this alternative submission. I will, however, make some brief comments. At para. 98 in *Wallace, Iacobucci J.* for the majority wrote that while the obligation of good faith and fair dealing is incapable of precise definition, "in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive."

[67] At para. 103, he elaborated that:

It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. *Addis, supra*. Thus, although the loss of a job is very often the cause of **[page496]** injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

[68] If Baycrest's conduct is, alternatively, viewed as a course of conduct respecting the manner of dismissal, it would also be a breach of the employer's duty of good faith and fair dealing. In addition to the evidence already reviewed, I note also the lack of candidness and forthrightness of Baycrest respecting its intentions for having Prinzo return quickly to modified duties, and the insensitive comment at the meeting of February 9, 1998 that Prinzo's conduct may cause harm to the residents. The findings of the trial judge support the conclusion that the manner of dismissal caused more than injured feelings and emotional upset; it was humiliating and damaging to the self-esteem of a

long-term employee who had demonstrated the greatest concern for the welfare of the residents.

[69] Prinzo would, accordingly, be entitled to compensation by way of an extended notice period. As Iacobucci J. elaborated at para. 104:

Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.

(Emphasis added)

[70] Iacobucci J. went on at para. 107 to note that the availability of compensation for these types of injuries has been recognized in other areas of the law, such as libel and defamation:

In my view, there is no valid reason why the scope of compensable injuries in defamation situations should not be equally recognized in the context of wrongful dismissal from employment. The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible.

[71] The issue of mitigation of damages did not arise in Wallace. Ordinary damages for wrongful dismissal are subject to a duty to *[page497]* mitigate on the part of the employee. The amounts earned in mitigation are deducted from the amount of damages awarded to an employee in lieu of notice.

[72] Prinzo fulfilled her duty to mitigate by finding alternative employment. Her new employment paid somewhat less than her previous employment. Baycrest only has to make up the difference between her salary level at Baycrest and what she was earning at Allstate during the ordinary notice period. If this deduction of earned income were also made from the damages awarded in relation to a "Wallace extension", Prinzo would not effectively be compensated for the injury done to her. This result would appear incongruent with the Supreme Court's view in Wallace that the injuries resulting from bad faith conduct on the part of the employer are "sufficient to merit compensation in and of themselves" irrespective of whether the bad faith conduct affects employment prospects. On the basis that intangible injuries cannot normally and completely be

mitigated by finding other employment, it has been suggested that the extended notice period be treated as akin to a severance payment which is not subject to mitigation. [See Note 3 at end of document] This issue was not, however, argued before us, and having regard to my earlier conclusion upholding the trial judge, I need not resolve it.

Issue 5: Punitive Damages

[73] The trial judge awarded punitive damages of \$5,000. Baycrest submits that there was no basis for the trial judge's award of punitive damages. In her cross-appeal, Prinzo seeks an increase in the amount of punitive damages to \$15,000.

[74] Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196, 126 D.L.R. (4th) 129. The principles concerning the award and assessment of punitive damages were most recently canvassed by the Supreme Court in *Whiten v. Pilot Insurance Co.*, *supra*, and in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, 2002 SCC 19, 209 D.L.R. (4th) 318, released concurrently. An award of punitive damages must serve a rational purpose. Punitive damages are only rational if compensatory damages do not adequately achieve the objectives of *[page498]* retribution, deterrence or denunciation. Compensatory damages also punish. The question is whether more punishment is rationally required to achieve these objectives: *Whiten*, *supra*, at paras. 43 and 123; *Sylvan Lake*, *supra*, at paras. 82-84. The rationality test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum: *Whiten*, *supra*, at para. 101; *Sylvan Lake*, *supra*, at para. 85. Inasmuch as punitive damages are not at large, courts have a greater scope and discretion on appeal: *Hill v. Church of Scientology*, *supra*, at para. 197.

[75] The trial judge gave no reason for his award of punitive damages in addition to his award of damages for mental distress. Nor did he engage in an analysis of the applicable principles governing punitive damages. The misconduct found against Baycrest was its harassment of Prinzo constituting the tort of intentional infliction of mental suffering. That conduct has already been compensated by the award of damages for mental distress. Punishment in the form of an award of punitive damages is not necessary for deterrence purposes. In my opinion the award of punitive damages serves no rational purpose. I would set aside the award of punitive damages.

Issue 6: The Costs Award

[76] The trial judge awarded Prinzo solicitor-and-client costs but provided no reasons for doing so. Nor did he provide counsel the opportunity to make submissions on costs. As a general rule solicitor-and-client costs are awarded on very rare occasions such as when a party has displayed outrageous conduct during the proceedings: *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13 at para. 86, referring to *Young v. Young*, [1993] 4 S.C.R. 3 at p. 134, 108 D.L.R. (4th) 193 (where partial solicitor-and-client costs were upheld on the basis of the husband's non disclosure

of financial information during the trial). On occasion reasons of public interest may also justify the making of such an order: Mackin, *supra*, at para. 86, referring to *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 80, 88 D.L.R. (4th) 1. This court's decision in *Foulis v. Robinson* (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (C.A.) contains a very helpful analysis of the jurisdiction to award costs on a solicitor-and-client basis, or substantial indemnity scale as they are now called. Dubin J.A. at p. 776 O.R., p. 142 D.L.R. cautions against a trial judge awarding solicitor-and-client costs because the parties did not settle, or second guessing how a trial should be conducted. **[page499]** Costs on a solicitor-and-client scale are not to be awarded as damages. They are awarded to mark the court's disapproval of the conduct of a party during the litigation: *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1, 111 D.L.R. (4th) 428 (C.A.) at p. 23 O.R., citing with approval *Foulis, supra*, notwithstanding the broad discretion of a trial judge contained in rule 49.13 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194]. In light of these principles, the trial judge erred in awarding solicitor-and-client costs because there is no basis in the record for such an award. I would set aside the award of costs.

CONCLUSION

[77] The appeal is allowed in part with respect to the issue of the length of notice, punitive damages and costs at trial. The cross-appeal is also allowed in part with respect to the time when notice of termination was given. The judgment is otherwise confirmed.

[78] I will leave it to the parties to do the mathematical calculation resulting from these reasons. If the parties cannot agree further submissions may be made in writing. Counsel have advised that settlement offers were made that may be relevant to the award of costs at trial. Consequently, the court will entertain brief written submissions dealing with the award of costs at trial and on appeal. Counsel for the respondent shall deliver submissions, and a bill of costs in relation to the appeal, no later than seven days from the date of this judgment. Counsel for the appellant may deliver a response, if any, within seven days thereafter.

Appeal and cross-appeal allowed in part.

Notes

Note 1: But see *Farley v. Skinne*, [2001] 4 All E.R. 801 (H.L.), where the House of Lords rejected the proposition that intangible interests are protected only where they are the "very object of the contract". Lord Steyn wrote at p. 812 All E.R.: "It is sufficient if a major or important object of the contract is to give pleasure, relaxation or peace of mind."

Note 2: See, for example, *Klar, supra*, at p. 62; *Linden, supra*, at pp. 53-56; *Fridman, supra*, at pp. 47-50; *Fleming, The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at pp. 37-40; *Ball, Canadian Employment Law*, looseleaf (Aurora, Ont: Canada Law Book, 1996) at pp. 20-62ff; and *England and Christie, Employment Law in Canada*, 3rd ed., looseleaf (Markham, Ont.: Butterworths, 1998) at p. 16.45ff.

Note 3: Ball, *supra*, at pp. 22-41 writes that the remedy of an extended notice period becomes a hollow one where an employee has 'mitigated' his or her intangible damages by finding other employment.