In the Court of Appeal of Alberta

Citation: Elgert v. Home Hardware Stores Limited, 2011 ABCA 112

Date: 20110426
Docket: 1003-0051-AC
Registry: Edmonton

Between:

Daniel John Elgert

Respondent (Plaintiff)

- and -

Home Hardware Stores Limited,
Christa Bernier and Diane Stengle

Appellants (Defendants)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment
of The Honourable Madam Justice Hunt
and of The Honourable Mr. Justice Costigan

Memorandum of Judgment
of The Honourable Madam Justice Conrad
Dissenting in Part

Appeal from the Judgment by
The Honourable Mr. Justice D. Lee
Sitting with a Jury
Dated the 28th day of January, 2010
Filed on the 18th day of February, 2010
(Docket: 0203 12593)

Memorandum of Judgment

The Majority:

I. Introduction

[1] A jury concluded that the appellant, Home Hardware Stores Limited (Home Hardware), wrongfully dismissed the respondent, Daniel John Elgert (Elgert), from employment. The jury awarded Elgert two years' pay in lieu of notice, $200,000 aggravated damages, $300,000 punitive damages, interest, and costs. It concluded that the individual appellants, Christa Bernier (Bernier) and Diane Stengle (Stengle), defamed Elgert, qualified privilege did not apply and awarded damages against them of $50,000 and $10,000, respectively.

[2] The appeal is allowed in part. The award for aggravated damages is set aside and the award for punitive damages is reduced to $75,000.

II. Issues

[3] The appellants submit the trial judge erred by admitting character evidence, failing to provide a sufficient road map to the evidence, allowing the respondent to split his case, admitting irrelevant and confusing expert evidence, and leaving the issue of aggravated and punitive damages with the jury. In addition, they assert that the damage awards were inordinately high.

III. Background Facts

[4] A jury verdict does not contain reasons or fact findings. As background, we provide a summary of the uncontentious facts, as well as some of the evidence about the manner of dismissal. Other evidence is canvassed later as required by the individual issues.

[5] Home Hardware operates on the basis of dealer-owned stores. It has a large distribution centre in Wetaskiwin, Alberta that employs hundreds of people and services western Canada. The respondent Elgert, and appellants, Bernier and Stengle, worked at the Distribution Centre.

[6] Norris Bernier, Bernier's father, was the manager of the Distribution Centre and Elgert's boss when he was dismissed. At the time of trial, Norris Bernier had been with Home Hardware for 40 years and reported to Don Kirck (Kirck) at Home Hardware's head office in St. Jacobs, Ontario. Stew Gingrich (Gingrich), Vice-President of Human Resources for Home Hardware, also worked out of head office, and had been with Home Hardware for over 37 years. Gingrich and Norris Bernier were high school friends and both were long-term friends with Kirck.

[7] Elgert had worked at the Distribution Centre for nearly 17 years when, in 2002, his employment was terminated without notice. At the time of his dismissal, he was 48 years old and a supervisor earning a yearly salary of approximately $60,000.

[8] Bernier worked under Elgert's direct supervision for about a year and one-half prior to Elgert's termination. Elgert testified that he had received numerous complaints about her performance. In particular, problems had arisen when Bernier worked in the same area as a male co-worker in whom she had a romantic interest. She would follow him up and down the aisles and organize her work so that they could visit. This resulted in delays and numerous complaints because of blocked aisles. Elgert testified that in early 2002 he determined that Bernier would have to be relocated to another area. In addition, he testified that in February and March of 2002 he had put negative comments on her performance review and turned it in. Brian Hlusiak (Hlusiak), his immediate supervisor, remembered seeing some negative performance comments. He acknowledged that it could have been Bernier's and that he could have told Elgert that Bernier would not be happy, but he could not remember.

[9] Two co-workers testified that Bernier was very unhappy with Elgert when he moved her to an area different from that of her boyfriend. One testified hearing Bernier say she would "get even" with Elgert, and another heard her say words to the effect that he would pay for it.

[10] Shortly after Bernier's transfer, she told her father about an incident she alleged happened in November or December of the previous year – approximately 4 months earlier. She said that Elgert had followed her up some stairs into a storage room and belly bumped her against a table, ending with his legs between hers. She said she yelled and after another employee, Kim Fontaine (Fontaine), came into the room, she left.

[11] Stengle was Bernier's friend. She worked in a different department, although occasionally she cleaned the warehouse area where Bernier and Elgert worked. At some point in early 2002, several friends from work, including Bernier and Stengle, were at Boston Pizza, when Stengle mentioned an incident with Elgert. She said she had been cleaning the first aid room, Elgert entered, turned off the light, belly bumped her, she fell on a cot and he fell on top of her. In her written statement she said that he might have tripped and fallen. She did not report it because she took it as a joke. After hearing about Stengle's incident, Bernier recounted to Stengle and two other co-workers what she said happened between her and Elgert.

[12] There was trial evidence about belly bumping, including Bernier's testimony that "belly bumping" was a silly thing Elgert did when he was in a hyper sort of silly mood. Fontaine testified it was something that they (usually men) would do when they were in a good mood, everything was working right, or perhaps when they went on holidays. He said it was a good mood kind of thing and three men at work (called the three musketeers by co-workers) did this often.

[13] Bernier told her father of the incident on or about April 1. Norris Bernier raised the issue of sexual harassment at the next Wednesday supervisors' meeting and provided materials related to Home Hardware's sexual harassment policies, which included a zero tolerance policy.

[14] Norris Bernier flew to Home Hardware's spring market meeting sometime between April 10 to 15. At trial, and again on appeal, the appellants took the position that Norris Bernier was not involved in the investigation. At trial, Norris Bernier denied discussing his daughter's allegations with Gingrich or Kirck at the spring meeting. Gingrich, on the other hand, said that Norris Bernier met with him in Ontario and discussed the issue of Elgert's sexual harassment of Bernier. Gingrich had not received any complaint at that time.

[15] The facts surrounding the initiation of the complaint are somewhat unusual. Bernier talked to another employee, her friend, Carolyn Bowen (Bowen), some time after the harassment pamphlets were distributed at the supervisors' meeting. Bowen talked to Michelle Borodawka (Borodawka), Home Hardware's human resource manager at Wetaskiwin, who sent an email to Kirck on April 15 reporting Bowen's allegations about sexual harassment including Bernier's incident. The email was not introduced into evidence because of Elgert's objection to its admissibility. Neither Stengle nor Bernier filed a formal written complaint. Gingrich said he had not seen the email when Norris Bernier raised the issue with him. In any event, a conference call took place among Norris Bernier, Gingrich, Kirck and Borodawka on April 23. That conversation noted that Kirck would come to Alberta to commence the investigation.

[16] Kirck had no training for dealing with sexual harassment complaints. In his 26 years with Home Hardware, he had limited experience with four or five previous sexual harassment complaints and had never conducted an investigation.

[17] When Kirck arrived in Wetaskiwin on April 30, 2002, he spoke with Borodowka and Bowen, who had written a letter detailing what she had told Borodowka. Neither had any first hand knowledge of the allegations. Kirck then spoke with Fontaine.

[18] Fontaine reported to Kirck that sometime before the Christmas party, he had heard a scream or yell and opened the door to the warehouse storage room where he saw Bernier and Elgert. He asked what was going on but Bernier left the room and he did not speak with Elgert.

[19] Kirck spoke with Bernier but did not take a written statement from her. Immediately following that meeting, but without speaking to Stengle, Kirck met with Elgert then suspended him from employment.

[20] Present at the suspension meeting were Elgert, Kirck, Borodawka and Elgert's immediate supervisor, Hlusiak. Kirck told Elgert that he had been accused of sexual harassment, but refused to provide particulars. Elgert testified that he asked Kirck several times what he was supposed to have done, and Kirck kept saying, "You know what you did" (A.R. 37/20). Elgert replied that he had no idea what he was supposed to have done. Elgert testified that he was crying and begging Kirck to tell him what he was alleged to have done. Instead, Kirck advised Elgert he was suspended immediately and escorted him out of the building. Elgert begged Kirck to do a thorough investigation as someone might be out to get him.

[21] Elgert was not allowed to return to his work station to pick up his belongings. He testified that he had a daily log book which would have contained entries regarding Bernier's work. Neither the log book nor his negative performance review of Bernier were produced during the litigation. They could not be located.

[22] Read-ins from Hlusiak's examination for discovery were entered at trial as evidence about the mood of the April 30 meeting. The read-ins contained Hlusiak's acknowledgment that he had been so upset by the end of the meeting that to gain some composure, he had to go outside for a while. Hlusiak was not called as a witness.

[23] Elgert's son, Trent Elgert, was also an employee at Home Hardware. He testified that immediately following the suspension, Kirck told him his father had been suspended for sexual harassment. Trent said he was shocked and asked whether there would be an investigation and if there was a chance that Elgert would not be terminated. Trent testified that Kirck replied that he would not have suspended his dad if he had not been 100 percent sure he was guilty. At this point, Elgert still had not been provided with particulars of the alleged sexual harassment. Gingrich acknowledged at trial that he thought Kirck had already made up his mind that Elgert was guilty, prior to meeting with Elgert.

[24] Following Elgert's suspension, he contacted a lawyer. He did not receive particulars of his alleged sexual harassment until May 10, 2002. Gingrich, who was continuing with Home Hardware's investigation, asked to meet with Elgert to discuss the allegations. Elgert wanted to bring his legal counsel. By this time Home Hardware was also receiving legal advice. Gingrich refused to meet with Elgert and his counsel. Gingrich acknowledged that he wanted to meet alone, because he was hoping to obtain a confession. There was no meeting. Rather, Elgert's counsel replied in writing, denying the allegations.

[25] A petition had been circulated containing names and numbers of other employees who supported Elgert. This was forwarded to management but no one on the list was contacted. Gingrich testified he assumed they were character references which would not have added anything material.

[26] On May 16, 2002, Home Hardware sent a formal letter of termination citing, *inter alia*, sexual harassment and insubordination for failing to attend a meeting with Gingrich. In addition to the Bernier and Stengle allegations, a further reason for dismissal was alleged bear hugs, including one given to Stengle on an earlier occasion. At trial, Stengle testified she was unaware of any bear hug.

[27] Elgert brought an action for wrongful dismissal and defamation.

IV. Jury Findings

[28] Counsel agreed on the specific questions to be put to the jury. The jury responded that Elgert did not commit the acts of sexual harassment alleged by Stengle or Bernier, and Stengle and Bernier each defamed Elgert by communicating a statement that could lead a reasonable person to conclude that he was guilty of sexual harassment. The jury found that Bernier and Stengle did not act in good faith when making the statements and were not entitled to the defence of qualified privilege. The jury also found Elgert's conduct did not justify his termination without notice, and that Home Hardware's conduct during the course of the dismissal constituted bad faith such that aggravated damages were appropriate. Moreover, the jury concluded that Home Hardware's conduct was harsh, vindictive, reprehensible, malicious, extreme in nature and deserving full condemnation and punishment in the form of punitive damages. The jury awarded Elgert 24 months' salary in lieu of reasonable notice, $60,000 for defamation, $200,000 for aggravated damages and $300,000 for punitive damages.

V. Standard of Review

[29] On matters of law, the standard of appellate review is correctness; on findings of fact, it is palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at paras 8 and 10. A high standard of review requiring an error in principle or overriding and palpable error applies to credibility assessments: *Prosser v 20 Vic Management Inc*, 2010 ABCA 57, 474 AR 288 at para 6.

[30] Whether an employee has been wrongfully dismissed is a question of mixed fact and law to which the standard of palpable and overriding error applies: *Dupuis v Edmonton Cellular Sales Ltd*, 2006 ABCA 283, 397 AR 376 at para 6.

[31] To interfere with the verdict of a civil jury on factual grounds, the appellants must show an unreasonable verdict, such as acting in the face of uncontradicted, credible and convincing evidence: *Hamblin v Ben*, 2004 ABCA 182 (available on CanLII) at para 3.

[32] An appellate court will not interfere with a jury's damage award unless palpable and overriding error results in an award that is wholly disproportionate or shockingly unreasonable: *Young v Bella*, 2006 SCC 3, [2006] 1 SCR 108 at para 64. A court can only interfere when a wrong principle of law was applied by a judge or jury or the overall amount is a wholly erroneous estimate: *Herron v Hunting Chase Inc*, 2003 ABCA 219, 330 AR 53 at para 38.

[33] A trial judge has wide discretion in making evidentiary rulings during trial: *Edmonton (City) v Westinghouse Canada Inc*, 2000 ABCA 80, 250 AR 385 at para 10. In concurring reasons, Fruman J.A. held that when there is an unexplained failure to object to the admission of evidence, there are only limited circumstances in which an appellate court will intervene; when the failure to object was deliberate, raising the objection on appeal may be precluded: *Mallet v Administrator of the Motor Vehicle Accident Claims Act*, 2002 ABCA 297, 330 AR 1 at para 62.

[34] In a civil jury trial, the lack of objections with respect to the jury charge and questions put to the jury are strong factors against finding that the charge was faulty and that a new trial should be ordered: *Royal Bank v Wilton* (1995), 165 AR 261, 123 DLR (4th) 266 at para 24 (CA); leave to appeal dismissed, [1995] SCCA No 145.

VI. Analysis

[35] At the hearing of the appeal, oral argument was directed primarily to the issue of damages, whether aggravated and punitive damages should have been left with the jury, and if so, whether the damages awarded were too high. At trial, the parties' counsel had prepared the questions and the charge to the jury, seeking directions from the trial judge only when they disagreed. The appellants do not contest the adequacy of the charge as it relates to damages. Rather, their argument is directed to whether there should be aggravated and punitive damages at all, and if so, whether the upper limit left to the jury by the trial judge was shockingly high.

[36] The factum contained several other grounds of appeal, which we deal with first.

A. Character Evidence

[37] The appellants argue that the trial judge allowed improper character evidence contrary to his earlier ruling, which evidence resulted in unreasonable jury findings. Elgert asserts that the challenged evidence was not good character evidence, was relevant to issues, and was largely not the subject of objections.

[38] At trial, the appellants challenged Elgert's right to call several witnesses to testify about his general good character. A list of the witnesses, with proposed questions, was provided to the trial judge and a ruling sought as to admissibility. In written reasons, the trial judge ruled that the proposed good character evidence was inadmissible: *Elgert v Home Hardware Stores Limited,* 2010 ABQB 35, 486 AR 137. He noted that in a defamation action there is a presumption of good character and this evidence was unnecessary, irrelevant and potentially prejudicial.

[39] The appellants contend that he nevertheless permitted character evidence from time to time. Their main concern surrounds the admission of certain questions arising from a petition circulated at the Distribution Centre in support of Elgert following his suspension.

[40] During the trial, when asked how his co-workers reacted to news of his termination, Elgert replied that a petition had been circulated. Following an objection, the trial judge ruled that while the petition itself was inadmissible, evidence about the date of the petition, whether signatories left their phone numbers, and whether signatories had been contacted was admissible as relevant to the manner of investigation and termination. Following this ruling, counsel asked Elgert: "We had talked about the fact that you were presented with a document with a number of employees that had

signed it indicating that they were in support of you and that they could be contacted for more information?" (A.R. 61/23-26) and "And, by my count, excuse me there is approximately 37 people that signed this?": *ibid* at line 29.

[41] The appellants say those questions breached the ruling against character evidence by showing that 37 people supported Elgert. Elgert claims the questions were relevant to the good faith manner of dismissal. He maintains that had the investigators contacted some of the signatories, they would have learned about his relationship with Bernier, her possible motives to fabricate and her threats to get even. This information could have impacted the investigators' assessment of the facts.

[42] We agree that the impugned evidence was not truly character evidence offending the good character ruling, but was arguably relevant to the quality of Home Hardware's investigation. Although the questions informed the jury that 37 co-workers supported Elgert, they did not address his general reputation and character. Moreover, if the appellants had concerns about the evidence, they should have sought a limiting instruction on its use on a timely basis. They did not.

[43] The appellants challenge other supposed good character evidence, including that Elgert taught Sunday school and that Elgert's wife's hair fell out because of stress. They argue that admission of this evidence must have unduly influenced the jury. Elgert says that the impugned evidence was not character evidence, and in any event, was relevant to issues about the investigation, credibility, motive or damages. In addition, Elgert underscores the absence of a timely objection.

[44] We agree that much of the challenged evidence was relevant to issues about the investigation. It was not adduced as character evidence, but as relevant to damages, potential motives and the workplace generally, thereby providing important context. In addition, some of the challenged evidence related to damages.

[45] In any event, the challenge about character evidence fails for lack of a timely objection. With one exception, the appellants made no objections to the evidence they now challenge. This greatly undermines their position on appeal.

[46] Elgert notes the appellants really raise this ground of appeal in an attempt to impugn the jury's findings, yet do not argue unreasonable finding as a ground of appeal. Instead, they submit that the character evidence must have been given unreasonable and irrational weight by the jury because otherwise it could not have decided as it did.

[47] We disagree with the appellants. This case was about credibility. While other conclusions could have been reached, there was evidence upon which this jury could have determined that Bernier was not reliable and had motive to fabricate. It is the jury's role to make credibility findings. Moreover, the totality of the jury findings and the damages it awarded suggest that the jury did not

consider this a close call. To the extent any impugned evidence was admitted, we are not satisfied it would have affected its findings.

[48] There is no basis for appellate intervention on grounds of inadmissible character evidence.

B. Lack of a Road Map

[49] The appellants submit the trial judge erred in not providing the jury with a "road map" and highlighting the most important evidence. Yet the parties themselves actually drafted the jury charge, only seeking direction from the judge when they could not agree. No one suggested more changes to the jury charge. There is no merit to this ground of appeal.

C. Splitting Elgert's Case

[50] The evidence of two witnesses, Alvin Kozack (Kozack) and Lori Polei (Polei), is at issue.

[51] During cross-examination, Bernier was asked whether she remembered being asked by an employee why she was so angry, and replying, "I've just been moved, Dan has no right to do that": A.R. 360/17. She denied having said that or having said she would "get even" with him or words to that effect. In rebuttal, Kozack testified that Bernier had talked to him about being moved and said she would get even with Elgert. Kozack also testified to his concerns about giving evidence because his receiving manager had told him if he testified "they're going to make your life living hell here": A.R. 700/10.

[52] As for Polei, during the trial notes of Gingrich's interview with Bernier were entered. They contained highly prejudicial statements made by Bernier about Polei and Elgert having had a relationship and about nude photographs. In addition, Bernier testified that there were rumours that Elgert had nude photographs of Polei, although she denied telling Polei that she had seen them.

[53] In rebuttal, Polei denied any romantic involvement with Elgert. Moreover, she said that after Elgert's suspension, Bernier had asked her if she was the one who made the allegations about Elgert because Bernier said she had pictures to prove it. Polei added, "To which I informed her, you've got pictures, you bring them in, let me and all the rest of the warehouse see them, because I have nothing to hide": A.R. 725/2-3. Polei also testified that she was "shocked" and angry "for being accused of something that there is no truth to": A.R. 725/10. The appellants submit that the trial judge erred in admitting that evidence, arguing that it was not rebuttal evidence but simply buttressed Elgert's case.

[54] Rebuttal evidence is admissible when the matter arises out of the defence case, is not collateral and the party could not have foreseen its development. Otherwise, the general rule is against case-splitting because of possible unfairness and to avoid unending alternation of fragments of the case: *R v Krause*, [1986] 2 SCR 466 at paras 15-16, 33 DLR (4th) 267.

[55] The trial judge viewed the testimony of Kozack and Polei as engaging the rule in *Browne v Dunn*, which imposes a general duty on counsel to put a matter directly to a witness if counsel intends later to adduce evidence to impeach the witness's credibility or present contradictory evidence: *Elgert v Home Hardware Stores Limited*, 2010 ABQB 66, 486 AR 199. Given that Bernier had denied being angry with Elgert and been cross-examined about nude pictures of Polei, Kozack's and Polei's evidence was relevant and probative. The trial judge was alive to the arguments about case-splitting but decided to exercise his discretion in Elgert's favour. To avoid any prejudice, he permitted the appellants to call surrebuttal evidence. The appellants recalled Bernier (who did not deny the key evidence of Polei and Kozack).

[56] The wide discretion of trial judges to make evidential rulings will not be interfered with lightly: *Westinghouse* at para 10. The trial judge did not mis-exercise his discretion to permit rebuttal evidence.

D. Expert Evidence

[57] At an early stage, the trial judge heard an application with respect to proposed expert testimony. Elgert wished to introduce an expert report prepared by Mia Norrie (Norrie), barrister and solicitor, on whether the investigation conducted by Home Hardware was fair and appropriate in the circumstances. The appellants objected to aspects of proposed oral testimony and the entire substance of the report.

[58] The trial judge ruled that the report was inadmissible, because it was opinion based on discovery evidence. He held that Norrie was qualified to give opinion evidence in labour relations, development and implementation of harassment policies, investigative protocols, and investigations of harassment allegations. She was not permitted to testify as an expert on principles of law, nor make any assumptions or conclusions concerning the Home Hardware investigation based on facts in dispute, assumptions not proven or facts not in issue. He noted that an expert witness is to provide an opinion in the area in which the expert witness possesses special knowledge and expertise going beyond that of the trier of fact. While the evidence might be helpful, it was for the jury to determine which part of Norrie's experience and knowledge it would accept. The appellants then called Dwayne Chomyn as an expert to give evidence in the same area.

[59] The appellants now object to Norrie's evidence on the basis that there is no standard for workplace investigations of employee misconduct. Nor, say they, is there a duty to investigate. In addition, they argue that the oral evidence should not have been allowed because it could confuse the jury, causing them to use the evidence inappropriately.

[60] Elgert points out that the two experts agreed more than they disagreed. Both commented on their experience dealing with investigations for sexual harassment and opined on the elements of an adequate investigation. Much of the evidence was not opinion evidence but arose from their experience.

[61] The trial judge made a judgment call that the evidence of experts' experience with sexual harassment complaints might be helpful. Neither expert suggested there is a standard an employer must meet when dismissing an employee for sexual harassment. The impugned evidence may have helped the jury to identify some of the problem areas that should be considered when dealing with termination for sexual harassment. We cannot say that the trial judge erred in permitting the evidence. Moreover, he instructed the jury that it was the ultimate trier of fact.

[62] The appellants say that the trial judge erred in failing to charge the jury that there was no requirement in law for employers to formulate and draft sexual harassment policies, investigate complaints and conduct investigations in a certain manner. Elgert submits that an employer's failure to respect procedural fairness and lack of impartiality may be factors a trial judge considers when determining whether the employer can prove just cause: *Stone v SDS Kerr Beavers Dental*, [2006] OTC 558, [2006] OJ No 2532 at para 150, aff'd 2007 ONCA 543. In addition, he says an employer must exercise some degree of care in prosecuting allegations of sexual harassment: *Foerderer v Nova Chemicals Corporation*, 2007 ABQB 349, 418 AR 64 at para 137.

[63] With respect to the jury charge, the appellants did not seek the instruction they now do and made no objection to the charge. Nor was the trial judge asked for the special instructions now being sought.

[64] In our view, it is too late to challenge the findings on that basis. Moreover, we are not satisfied that this evidence was used improperly or provides any basis for appellate intervention.

E. Wrongful Dismissal Award

[65] The jury found that the respondent's employment was terminated without just cause and awarded damages equivalent to 24 months' salary in lieu of notice. The appellants submit that the trial judge failed to give the jury a proper notice period range, namely, 12 to 16 months.

[66] In *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 998, 91 DLR (4th) 491, the Supreme Court adopted four factors relevant to reasonable notice:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar

> employment, having regard to the experience, training and qualifications of the servant.

[67] These factors must be applied on a case-by-case basis, and no one factor should be given disproportionate weight: See: *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362 at paras 29 and 32.

[68] The trial judge considered the factors and correctly instructed the jury on the applicable principles. We cannot say the range was wholly erroneous. Elgert was a supervisor with nearly 17 years' service and was 48 years old at the time of his dismissal. When considering his duty to mitigate, the jury was entitled to consider the accusations of sexual harassment, which may have impacted his ability to find new employment.

[69] Moreover, at trial the appellants did not argue against the notice period proposed by Elgert. We dismiss this ground of appeal.

F. Aggravated and Punitive Damages

[70] Two main issues arise relating to aggravated and punitive damages. First, did the trial judge err by leaving either or both aggravated and punitive damages with the jury? If not, was the quantum of damages awarded so inordinately high as to fall outside any reasonable award? Subsumed in these issues is whether the trial judge erred in leaving the jury an upper range of $200,000 for aggravated damages and $400,000 for punitive damages.

[71] The appellants do not criticize the jury charge on aggravated and punitive damages. Rather, they say there was insufficient evidence to leave either head of damages with the jury. We begin this section by examining the nature of aggravated and punitive damages, then considering whether there was sufficient evidence to leave these matters with the jury. The question of quantum is discussed at paragraph 99ff.

1. Aggravated Damages

[72] Aggravated damages in wrongful dismissal cases are compensatory in nature. In *Honda*, the Supreme Court reviewed the history of the law relating to damages in cases of employment termination, noting that aggravated damages must be considered in the context of a breach of the employment contract. The Court held that aggravated damages are recoverable for breach of contract if such damages were contemplated by the parties at the time they formed the contract. As an employment contract is inherently subject to cancellation on notice, or payment in lieu of notice, "without regard to the ordinary psychological impact of that decision" (para 56), damages for mental distress caused merely by the dismissal are not in the contemplation of the parties because "dismissal is a clear legal possibility": *ibid*. As such, distress or hurt feelings ordinarily resulting from the **fact** of termination are not compensable: *Honda* at paras 54-57 (emphasis added).

[73] Damages resulting from the **manner** of dismissal (as opposed to the fact of dismissal) are available, however, if damages arise out of the conduct of the employer in the course of termination. To be compensable, such conduct must be unfair or in bad faith, in that it is "untruthful, misleading or unduly insensitive": *Honda* at para 57; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 152 DLR (4th) 1 at para 98. There is an "expectation by both parties to the contract that employers will act in good faith in the manner of dismissal" and failure to do so "can lead to foreseeable, compensable damages": *Honda* at para 58.

[74] In *Merrill Lynch Canada Inc v Soost*, 2010 ABCA 251 at para 16, 487 AR 389, this Court offered some examples of insensitive methods used by an employer during termination that could result in aggravated damages:

> [A] boss who tells all the fellow employees, or the employee's spouse and children, that the dismissed employee is stupid or incompetent. It is hard to think of circumstances where there would be any need to do that. Another example might be dismissing the employee within a day or two of a daughter's wedding, or of the death of a parent. Another example would be insincerely alleging to others embarrassing or demeaning (but unfounded) reasons for the dismissal (whether or not they would be just cause if true), when the employer does not honestly believe those grounds exist.

[75] Aggravated damages must be grounded in proof of actual damages resulting from the unfair or bad faith conduct in the manner of dismissal. They are not "an automatic enhancement of **all** 'wrongful dismissal' damages" and are not "triggered by the mere fact of dismissal": *Soost* at para 18 (emphasis in original). Thus, if actual damages are shown, a determination of whether an employee is entitled to aggravated damages arising out of the employer's conduct during termination must focus on whether the methods used were unfair or in bad faith, by being for example, untruthful, misleading or unduly insensitive: *Honda* at para 57.

[76] In *Honda* the majority stated:

> [I]f 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 ...
>
> para 59 (emphasis added)

[77] In *Mulvihill v Ottawa (City)*, 2008 ONCA 201 at para 51, 90 OR (3d) 285, the Court held that "baseless, unfounded or fabricated allegations of misconduct sufficient to constitute cause are, by definition, untruthful, misleading and insensitive." However, the "mere fact that cause is alleged, but not ultimately proven, does not automatically" entitle the employee to aggravated damages. Provided that the employer has a "reasonable basis" on which to base its belief that it may dismiss an employee for cause, the employer "has the right to take that position without fear that failure to succeed on the point will automatically expose it to a finding of bad faith": *ibid*.

2. Punitive Damages

[78] Unlike aggravated damages (which are compensatory) punitive damages are directed toward punishment: *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 at para 36. In *Whiten*, a breach of contract case, the Supreme Court held that punitive damages are awarded in exceptional cases for malicious and high-handed misconduct that offends a court's sense of decency. Punitive damages are limited to circumstances in which the misconduct "represents a marked departure from ordinary standards of decent behavior": *ibid*. The three objectives of punitive damages are "retribution, deterrence and denunciation": *ibid* at para 43.

[79] In the context of a wrongful dismissal action, punitive damages are recoverable when the employer's conduct gives rise to an independent actionable wrong: *Honda* at para 62. In *Whiten*, the Supreme Court held that an independent actionable wrong does not require the commission of a separate tort. Rather, an independent actionable wrong can be found "in a breach of a distinct and separate contractual provision or other duty, such as a breach of a fiduciary obligation", or the breach of a contractual good faith obligation: *Whiten* at paras 82 and 83. Punitive damages "are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own": *Honda* at para 62.

[80] Punitive damages require careful consideration and the discretion to award them should be exercised sparingly. Courts should only "resort to punitive damages in exceptional cases": *Honda* at para 68. Courts "must focus on the defendant's misconduct, not on the plaintiff's loss": *Honda* at para 69.

[81] As to quantum of punitive damages, courts should be alert to the fact that compensatory damages already awarded carry an element of deterrence: *Honda* at para 69. In *Whiten*, the Court held that the governing rule for the quantum of punitive damages is proportionality:

> The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation).
>
> para 74

[82] Six dimensions of proportionality apply:

(i) Proportionate to the Blameworthiness of the Defendant's Conduct – The more reprehensible the conduct, the higher the rational limits to the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.

(ii) Proportionate to the Degree of Vulnerability of the Plaintiff –The financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.

(iii) Proportionate to the Harm or Potential Harm Directed Specifically at the Plaintiff.

(iv) Proportionate to the Need for Deterrence – A defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.

(v) Proportionate, Even After Taking Into Account the Other Penalties, Both Civil and Criminal, Which Have Been or Are Likely to Be Inflicted on the Defendant for the Same Misconduct – Compensatory damages also punish and may be all the "punishment" required.

(vi) Proportionate to the Advantage Wrongfully Gained by a Defendant from the Misconduct.

Whiten at paras 111-126

G. Should Aggravated and Punitive Damages Have Been Left with the Jury?

[83] Did the trial judge err by leaving aggravated or punitive damages with the jury? The appellants argue that the trial judge's reasons for doing so were faulty. In particular, as to aggravated damages, they say there is neither evidence that Home Hardware acted badly in the course of Elgert's dismissal, nor evidence that Elgert suffered actual damages as a result of the manner of his dismissal (versus the fact of dismissal). As to punitive damages, they say he neglected to consider the whole of the evidence in concluding there might be a basis for an award of punitive damages.

[84] In his reasons on this point, the trial judge was alive to the fact that aggravated damages are not an extension of the notice period, but are to be considered from the point of view of the actual damages for mental distress suffered by the employee as a result of unfairness and bad faith in the manner of dismissal: *Elgert v Home Hardware Stores Limited*, 2010 ABQB 65 at paras 29-41, 486 AR 188 ("Damages Ruling"). He also noted that a punitive damages award requires "harsh, vindictive, reprehensible and malicious" conduct by an employer: para 4. The trial judge correctly observed that the threshold for aggravated or punitive damages is more than a mere scintilla of evidence and that a trial judge must be satisfied that there is sufficient evidence to support such damages before leaving the question to the jury: para 42.

[85] In order to determine whether there was sufficient evidence to support the trial judge's decision to leave aggravated and punitive damages with the jury, we must examine the evidence as a whole to determine if it can support the jury's finding unfairness or bad faith conduct in the manner of dismissal (to provide the threshold for a possible award of aggravated damages) and harsh, vindictive, reprehensible, malicious conduct (to justify a possible award of punitive damages). Put another way, viewed from the appellants' perspective, what is the worst view of the case this evidence can reasonably support? In relation to aggravated damages, we also need to assess the evidence supporting Elgert's claim to actual damages arising from unfairness in the manner of his dismissal.

[86] The following evidence and inferences about Home Hardware's treatment of Elgert are relevant both to possible aggravated and punitive damages as it concerns the way Home Hardware treated him:

a. Norris Bernier, Christa Bernier's father, had some involvement in the early stages of this matter. Bernier told her father about the incident on April 1 or 2.

b. Norris Bernier called a meeting of supervisors within days (maybe April 3) and advised that there was a serious allegation of sexual harassment against a supervisor and there was an investigation. Pamphlets relating to sexual harassment policies were circulated.

c. Although, Norris Bernier denied discussing this matter with his friends Gingrich or Kirck, Gingrich confirmed that Norris Bernier discussed it with him on April 15, before head office had received any complaint.

d. Bernier did not file the originating complaint. Rather, her friend Bowen talked to Borodawka then sent a letter outlining the Stengle and Bernier incidents and other incidents involving others. Borodawka sent an email to Kirck on April 15 advising of Bowen's complaint, then sent her letter on April 23. There was a notation in Gingrich's interview with Borodowka "trying to keep Christa's [Bernier's] name out."

e. In a conference call on April 24 among Norris Bernier, Gingrich, Borodawka, and Kirck, Kirck advised he would commence the investigation.

f. Notwithstanding what was described as the most serious allegation of sexual harassment ever at Home Hardware, Kirck (who had no training or experience in investigations) was sent to investigate.

g. Elgert was called to the boardroom where he met his immediate supervisor Hlusiak, Borodawka and Kirck. Evidence suggests that Kirck's manner was accusatory. Elgert asked what he was supposed to have done, and was told he knew. Elgert said he did not know and begged for information but no information was provided and no questions were asked as to his side of the story. Elgert begged them to investigate. He was crying and very upset. Kirck suspended him immediately. He was told to hand in his radio and keys. He was not allowed to return to his work station or locker to gather his personal effects. Kirck escorted him out of the building through the lunch room.

h. Read-ins from Hlusiak confirmed Elgert's evidence that he was very surprised, upset and crying at the meeting. He confirmed that Elgert asked what it was about and that Elgert appeared to be struggling to understand the nature of the allegation. Elgert asked for a careful investigation in case someone was just out to get him. Hlusiak acknowledged that he was so upset after the meeting he had to go outside to compose himself. Borodawka's notes confirmed that Hlusiak had to leave the building to compose himself.

i. Elgert was not provided with particulars prior to the interview. The experts disagreed on whether particulars should be provided prior to interview as sometimes an investigator wants to start out with cold questions leading up to the issue, but they agreed particulars should be provided in the course of the initial interview. Allegations were not provided for 10 days.

j. Following Elgert's suspension, Kirck told Elgert's son, Trent, that Home Hardware would not have suspended his dad if he was not 100 percent positive.

k. Gingrich confirmed that Kirck had already made up his mind as to Elgert's guilt before speaking to him. Kirck had not talked to Stengle at the time of the interview and had no written statements; although he had talked to Fontaine.

l. There was no effort during the investigation to examine the relationship between Bernier and Elgert or interview people, other than Fontaine, who worked directly with them.

m. Home Hardware never considered motive or fabrication. Both experts indicated that this is an essential aspect of a proper investigation. Both emphasized that an investigator's role is to be impartial, neutral, and objective. Although they had the evidence of Fontaine, there is at least some evidence that Home Hardware largely accepted what Bernier said at face value.

n. Elgert testified that shortly before Bernier's allegations (in either February or March) he had handed in a negative performance review on Bernier. Read-ins from Hlusiak confirmed that Hlusiak recalled seeing some reviews but was not sure who they were about. When asked on discovery whether he had remembered reading Bernier's review and then saying words to the effect "she's not going to be happy with it", he replied "no, could have, I don't know." He was pretty sure Elgert had done a couple of reviews. This performance view was never produced and Hlusiak could not locate it.

o. Elgert's planners containing all his notes about performance issues with Bernier were at Home Hardware and could not be located, leading to a possible inference that they were lost or accidentally or intentionally destroyed. Similarly, the performance review he completed on Bernier in March 2001 was never produced.

p. Home Hardware acknowledged it was aware of the stigma attached to sexual harassment and the effect on future employment of dismissal for this cause.

q. Despite providing particulars of similar allegations against employees in past cases, Home Hardware did not do so here in a timely way.

r. Gingrich did not come to the Distribution Centre to conduct interviews until May 8, notwithstanding Home Hardware knew that Elgert had still not been provided with particulars, was aware that employees would know of Elgert's suspension and connect it to the earlier supervisors' meeting with Norris Bernier.

s. Although Gingrich learned of Bernier's work ethic issues from Ron Shantz, he made no further inquiries about her work and possible motives with respect to her supervisor.

t. During the interview with Bernier, Gingrich asked about gossip involving Elgert. Bernier offered rumours of Elgert having an affair with Polei and having naked pictures. Had an effort been made to talk to some of other employees or with Polei, Gingrich may have received information that would at least call Bernier's credibility into question.

u. Gingrich requested a meeting with Elgert but refused to meet with his lawyer. He acknowledged that it was his hope to get a confession from Elgert. While an employer has a right to speak to an employee directly, this behaviour can be taken into account here, especially since particulars were not provided to Elgert when he asked for them.

v. Notwithstanding Home Hardware's position of zero tolerance, and the letter of complaint that referenced other employees, only Elgert was investigated. Home Hardware did not investigate Bernier's alleged incident with Fontaine despite allegations that someone had witnessed that event.

w. The termination letter listed bear hugs as one of the reasons for dismissal, and in particular, a bear hug given to Stengle. By this time, Stengle had been interviewed and had no memory of such an incident. At most, she said Elgert could have poked her. A possible inference is that this incident was not documented to the file at the time, but papered later. The inclusion of the incident on the termination letter was at least misleading.

x. Similarly, the termination letter mentioned insubordination for not meeting with Gingrich. When cross-examined, Gingrich acknowledged that sexual harassment was really the reason.

y. There was evidence to support the view that the suspension was unjustified. Home Hardware's expert said suspensions were justified in two circumstances: to protect the Home Hardware "brand" and to ensure personal safety.

There was no evidence on either of these issues. In fact, Bernier continued to work under Elgert's supervision for almost five months after the alleged incident. Neither she nor Kirck recalled discussing the issue of safety concerns or the suspension itself. Even without expert evidence, it would be possible to conclude that there were insufficient grounds to suspend Elgert.

[87] Although the above list is not exhaustive, it demonstrates there was sufficient evidence to permit a jury to conclude that the manner of dismissal was unfair, in bad faith, misleading, or unduly insensitive. It is capable of supporting inferences of bad faith, including that Norris Bernier participated in a matter involving his daughter; his friends Kirck and Gingrich had carriage of the file, even though Kirck was inexperienced; there was a lack of the necessary neutrality on Home Hardware's part; and the decision to terminate Elgert was a *fait accompli*. It could also support the view that the manner of dismissal was unfair, particularly given Home Hardware's conduct of its meeting with Elgert; its decision to suspend him when there was arguably no good reason to do so at the time; and its failure to conduct an appropriately broad investigation that took account of Bernier's possible motives against Elgert.

[88] When evaluating the employer's conduct in the context of punitive or aggravated damages, it is important to acknowledge that an employer cannot be faulted for honestly believing an allegation of sexual harassment (or any other wrongdoing) and should not be punished simply because an investigation was clumsy or a jury subsequently concludes that the allegation was not substantiated. An employer is entitled, indeed sometimes required, to make decisions to suspend or terminate employees (even if a court subsequently disagrees with its assessment) without being subject to a claim for punitive or aggravated damages. Employers must take seriously allegations of sexual harassment. There is no specific standard of investigation that employers must follow; what is required will vary depending on the facts surrounding the employer, its policies, sophistication, experience and the workplace. Courts must not require such a high standard of investigation that there is a chilling effect on employers' manner of dealing with allegations of sexual harassment.

[89] Nevertheless, how the employer reacts is subject to judicial scrutiny. Its responsibilities do not give it licence to conduct an inept or unfair investigation or behave in malicious, vindictive, or outrageous ways. Here there was sufficient evidence about how Home Hardware handled Elgert's case to leave punitive damages with the jury. Much of the same evidence could support leaving aggravated damages with the jury, subject to the question of whether there was sufficient evidence of Elgert's actual damages arising from the manner of his termination to sustain an award of aggravated damages.

[90] Unfortunately, the trial judge's reasons on aggravated damages did not refer to evidence of actual damage. Rather in his reasons he noted that Elgert experienced "intangible benefits" from his employment and that the loss of his position would be "embarrassing, humiliating and traumatic", and would impose financial hardships on him: Damages Ruling at para 37. With respect, none of the above points could support a claim for aggravated damages, as they are the effects that many (if not most) employees would suffer simply from being terminated, in whatever manner.

[91] What evidence, then, would support Elgert's claim for aggravated damages?

[92] A review of the transcript reveals that during counsel submissions about leaving aggravated damages with the jury, there was very little discussion of the need for Elgert to show actual damages in order to support this claim. Likewise, the topic received scant attention in Elgert's appeal factum.

[93] During oral argument, when pressed on this point, Elgert's counsel referred us to admissions made by Gingrich at AB 568-9 where Gingrich acknowledged that Elgert is an emotional person; that being suspended is humiliating, could be embarrassing and can be traumatic and stressful; and that for someone like Elgert, who loved his job, a suspension would be all those things. This evidence, however, cannot support Elgert's claim that he suffered actual damages as a result of the manner of his termination.

[94] Counsel also referred us to Elgert's own evidence. In that regard the only marginally relevant passage is as follows:

> Q: How did **the termination** from Home Hardware affect you emotionally?
>
> A: Well emotionally it was devastating. Draining. Just took away all my self-esteem, all my confidence. I just remember night after night crying with Shelley in bed, crying ourselves to sleep, thinking that, you know, this was just all a bad dream.
>
> A.R. 57/5-8 (emphasis added)

[95] There are suggestions in the transcript that he reacted emotionally during his testimony:

> Q: Dan, this meeting happened almost eight years ago. It's upsetting for you but if you can continue on with how the rest of the meeting unfolded?
>
> [...]
>
> Q: Were you as upset as you are today?
>
> A: Yes, it was -- my world was coming apart and I didn't know why.
>
> A.R. 38/25-39/4

[96] During closing submissions to the jury, his counsel also suggested Elgert's manner of testifying revealed the negative impact of his experiences on him. Likewise, at the appeal hearing, Elgert's counsel stressed the importance of Elgert's demeanour during his testimony. The above evidence is very vague as to how it might relate to Elgert's actual damages. Moreover, it is far from clear that any distress displayed by Elgert during the trial was a result of how he was terminated rather than the fact that he was terminated. It is also problematic that the trial judge took no account of Elgert's demeanour in reasoning that there was sufficient evidence of actual damages to support a claim for aggravated damages: *Elgert v Home Hardware Stores Limited*, 2010 ABQB 71, 486 AR 213 ("Quantum Reasons"). Indeed, it is somewhat telling that in his decision about possible ranges for an award for aggravated damages, he relied not on any evidence about actual damages but rather on expert reports concerning Elgert's loss of income. That topic was irrelevant to an aggravated damages claim and further underscores the paucity of evidence showing actual damages.

[97] Although a plaintiff does not necessarily have to provide medical evidence to show that he has suffered actual damages as a result of the manner in which he was terminated, the trial judge correctly noted that there must be more than a scintilla of evidence. This record is simply inadequate in that regard. There was no basis for leaving the issue of aggravated damages with the jury.

[98] We turn now to questions about quantum as it pertains to punitive damages.

H. Quantum of Punitive Damages

[99] At the appellants' urging, the trial judge gave the jury the range of possible awards for punitive damages. (Because of the unique circumstances of this case, the decision in *McGrath v Pendergras*, [1988] 86 AR 291, 60 Alta LR (2d) 276 (CA), is not engaged). The trial judge advised the jury that the range was zero to $400,000. The appellants argue that this range was exorbitant and contributed to the jury's arriving at an irrational quantum. Under the circumstances here presented, our task is to determine whether the jury award for punitive damages is wholly disproportionate or shockingly unreasonable, and went beyond what was necessary to punish Home Hardware.

[100] Again, the trial judge's Quantum Reasons for the range he picked helps set the context. He referred to employment cases relied on by the appellants to show that in only one (*Pawlett v Dominion Protection Services Ltd*, 2008 ABCA 369, 302 DLR (4th) 336) were punitive damages awarded, in the amount of $5,000. Elgert's counsel relied on *Whiten* and *Hill v Church of Scientology*, [1995] 2 SCR 1130, 184 NR 1, neither of which were employment cases. In his conclusion about a possible range, the trial judge noted at para 25 that "moderate damages were usually sufficient because of the stigma of an award of punitive damages creates." His reasoning then continued:

> [28] To simply restrict one's self to decided cases as the Defendants have where aggravated or punitive damages were awarded is not to provide any meaningful Range for a Jury because it is fair to say in law that aggravated, and especially punitive damages, are exceptional forms of relief. By definition the decided cases, the vast majority of which are decided in Judge Alone trials, in their final result will greatly skewer any average given that aggravated and punitive damages are relatively seldom ever awarded.
>
> [29] As such I conclude that a reverse analysis should be done. Quantum Awards by juries will generally stand up to appellant review unless they are so egregiously high that they are perverse and must be vacated. The high end of the Range to submit to this Jury should therefore limit this Jury to an award that is not perversely high in any circumstance of this case, without unduly restricting the Jury to award exceptional punitive damages if they see fit. Therefore I conclude that the Jury will be given the range of zero to $400,000 if they find that Home Hardware is liable for exceptional punitive damages.

[101] This reasoning is not entirely clear. At the least, it appears to wrongly disregard decided cases in order to arrive at an appropriate range, and under-value the need to award punitive damages only when they achieve some rational purpose related to retribution, denunciation or deterrence. It also de-emphasizes the point that if the compensatory damages adequately meet the goal of

punishment and deterrence, there will be no need for punitive damages: *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2000 ABCA 116, 255 AR 329 at para 28.

[102] The range of punitive damages is broad. Albeit not an employment case, *Whiten* upheld a punitive damage award of $l,000,000. In contrast, the highest recent award for punitive damages resulting from a wrongful dismissal action is $100,000: *Downham v Lennox and Addington (County)*, [2005] OTC 1025, 56 CCEL (3d) 112 (SCJ). Other awards in employment cases have been considerably more modest, see, for example, *Bouma v Flex-N-Gate Canada Co* (2004), 37 CCEL (3d) 301, [2004] OJ No 5664 (SCJ), where $15,000 was awarded for aggravated and punitive damages: *Mastrogiuseppe v Bank of Nova Scotia*, 2007 ONCA 726, 61 CCEL (3d) 1, where $25,000 was awarded for punitive damages.

[103] Appellate courts can be more interventionist as regards punitive damages than other jury awards. As stated in *Whiten* at para 107, "the test is whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct." The Court further explained at paras 108 and 109:

> In the case of punitive damages, the emphasis is on the appellate court's obligation to ensure that the award is the product of reason and rationality. The focus is on whether the court's sense of reason is offended rather than on whether its conscience is shocked.
>
> If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it will be reduced or set aside on appeal.

[104] Although this jury could have concluded from the evidence that punitive damages were justified (because, for example, Elgert's termination resulted from bias and was preordained, and because Home Hardware's treatment of Elgert was high-handed and vindictive), we cannot accept that the amount awarded by the jury was required to punish Home Hardware. Even assuming the worst possible view of Home Hardware's treatment of Elgert, given the constraints that accompany punitive damage awards (as well as the quantum of compensatory damages here awarded), in our view, the jury award was inordinately high and unnecessary to convey the message intended. Accordingly, we reduce the award for punitive damages to $75,000.

I. Range of Damages for Defamation

[105] The appellants, Bernier and Stengle, contend that the range of defamation damages between $5,000 to $60,000 submitted to the jury was in error because the trial judge failed to consider the cases providing guidance on a reasonable quantum.

[106] Damage awards for defamation of an individual are usually low. In *Hill*, the Court noted at para 169:

> From 1987 to 1991, there were only 27 reported libel judgments in Canada, with an average award of $30,000. Subsequent to the decision in this case, from 1992 to 1995, there have been 24 reported libel judgments, with an average award of less than $20,000.

[107] The appellants cite as comparable *Murphy v Alexander* (2004), 183 OAC 325, 236 DLR (4th) 302, and *Tremblay v Campbell*, 2008 NLTD 203, 289 Nfld & PEIR 81.

[108] In *Murphy*, a real estate agent was fired without cause and defamed by a claim that he had a gun and made threats. The trial judge found actual malice, the plaintiff's reputation within the real estate community was damaged and he lost real estate deals because of the defamation. General damages were assessed at $30,000. The Ontario Court of Appeal reduced the award to $10,000.

[109] In *Tremblay*, the defendant sent a letter alleging criminal behaviour to the plaintiff in the context of a condominium corporation dispute. The letter was copied to the plaintiff's employer and other unit holders in the condominium. Taking into account the limited distribution, evidence that others did not believe the allegation in the letter, the lack of repercussions to the plaintiff's employment or his status with the employer's company and the malicious intent of the defendant, the trial judge awarded $7,000 for general damages and $5,000 for aggravated damages.

[110] Elgert cites no defamation decisions to support the range of damages other than *Hill*, where $300,000 was awarded for general damages.

[111] *Hill* is distinguishable. Hill was a young lawyer working as a Crown prosecutor. As the Supreme Court noted at para 177, "For all lawyers their reputation is of paramount importance." The Court listed many other factors supporting the high award and concluded at para 195:

> In summary, every aspect of this case demonstrates the very real and persistent malice of Scientology. Their actions preceding the publication of the libel, the circumstances of its publication and their subsequent actions in relation to both the search warrant proceedings and this action amply confirm and emphasize the insidious malice of Scientology. Much was made of their apology tendered at the time of the hearing in the Court of Appeal. There is a hollow ring to that submission when it is remembered that it was not until the fifth day of oral argument before the Court of Appeal that the apology was tendered. Scientology can gain little comfort from such a late and meaningless apology.

[112] Recent Alberta decisions have awarded between $5,000 and $25,000 as general damages for defamation.

[113] In *Varga v Van Panhuis*, 2000 ABQB 538, 269 AR 211, the plaintiff, a municipal councillor running for re-election, was defamed in a publication sent to most of the households in the town. No special damages were proved. General damages of $5,000 were awarded.

[114] In *Olson v Runciman*, 2001 ABQB 495, 291 AR 195, the plaintiff was accused of taking bribes contrary to his employment duties with Transport Canada. The five defamatory letters were copied to the Minister of Transport, a director of Transport Canada, the plaintiff's member of Parliament and the parties' lawyers. The allegations were the subject of a number of investigations. The plaintiff claimed he suffered at his workplace because of the allegations. The trial judge found the letters were motivated by express malice. However, the plaintiff failed to prove his early retirement and anxiety and depression were caused by the defamation. He was awarded $25,000 general damages and $25,000 aggravated damages.

[115] A recent Ontario case, *Warman v Grosvenor* (2008), 92 OR (3d) 663 (SCJ), involved a defamatory statement alleging sexual assault. The plaintiff was a lawyer who worked for the Government of Canada on human rights issues. He was defamed on the internet and in personal emails as part of a "two year campaign of terror" by the defendant who accused the plaintiff of, among other things, criminal activities and child sexual assault. The statements were described as particularly vicious, profane and extreme. The defamatory postings continued up to the time of trial. The plaintiff was awarded damages for defamation and assault because the level of malevolence was more than empty threats and insults and made the plaintiff apprehensive of imminent physical harm. He was awarded $20,000 for defamation, $10,000 for aggravated damages for defamation, $15,000 for assault damages and $5,000 aggravated damages for assault.

[116] The jury's findings demonstrate that they believed Bernier and Stengle lied about the sexual harassment and did so maliciously. Although reporting sexual harassment to an employer is an occasion of qualified privilege, that privilege is lost when there is malice.

[117] The defamatory remarks were made to co-workers and superiors. Not surprisingly, those allegations and Elgert's resulting termination spread through the workplace and his small town, affecting his re-employment.

[118] The trial judge left an upper figure of $60,000 to be apportioned between the two defamers: Quantum Reasons at para 37. The jury obviously took a harsh view of Bernier's behaviour, awarding $50,000 against her but only $10,000 against Stengle.

[119] Although the $60,000 defamation damages award is high, it is not unreasonable. Accordingly, we decline to interfere.

VII. Conclusion

[120] The appeal is allowed in part. We set aside the award of $200,000 for aggravated damages. The punitive damage award is reduced to $75,000. In all other respects, the appeal is dismissed.

Appeal heard on November 30, 2010

Memorandum filed at Edmonton, Alberta
this 26th day of April, 2011

Hunt J.A.

Costigan J.A.

Conrad J.A. (Dissenting in Part):

[121] I concur with the conclusions reached by my colleagues with the following two exceptions. First, I am of the view that the trial judge did not err in leaving aggravated damages with the jury. Second, I am of the view that an award of $75,000 for punitive damages undermines the quantum of damages selected by the jury.

I. Aggravated Damages

[122] Ample evidence – indeed considerable evidence – existed to conclude that the manner of dismissal was unfair. The real question was whether there was sufficient evidence upon which a properly instructed jury, acting reasonably, could conclude that actual damage was sustained as a result of the unfair manner of dismissal.

[123] There was, in my view, sufficient evidence to put this question to the jury. As noted by the majority, Elgert's own evidence spoke of his stress. At 57 of the trial transcripts:

> Q MS. PENTELECHUK: Mr. Elgert, I want to focus now on the last seven-and-a-half years or so since you were officially terminated on May 16th, of '02.
> How did **the termination** from Home Hardware affect you emotionally?
>
> A Well emotionally it was devastating. Draining. Just took away all my self-esteem, all my confidence. I just remember night after night crying with Shelley in bed, crying ourselves to sleep, thinking that, you know, this was just all a bad dream.
>
> [emphasis added]

[124] Again at 38 and 39:

> Q Dan, this meeting happened almost eight years ago. It's upsetting for you but if you can continue on with how the rest of the meeting unfolded? How
>
> . . .
>
> Q Were you as upset as you are today?
> A Yes, it was -- my world was coming apart and I didn't know why.

[125] Moreover, there was evidence relating to the facts surrounding the suspension and the stress suffered by Elgert on that occasion, where Elgert was crying and begging for particulars of the alleged sexual harassment. That alone could support a finding that Elgert suffered stress related to the unfair manner of treatment during the dismissal process. The question of whether actual damage

was sustained is a question of fact for the jury. In addition, it was for the jury to decide how much, if any, of Elgert's stress related to the manner of dismissal as opposed to the fact of that dismissal. Certainly, it would not be difficult for a jury to conclude that the manner of handling this type of allegation which carries such negative stigma and humiliation would cause stress. As my colleagues so accurately noted, it is not necessary that there be medical evidence to prove actual harm.

[126] I agree with the respondent's counsel who so aptly argued that we should be slow to second guess the issue of stress related damages where the jury was able to observe this witness who, at trial some eight years later, still demonstrated considerable stress. The jury had the advantage of listening to Elgert as he testified to the different issues surrounding his dismissal, including both the fact and the manner of that dismissal. The question of whether actual damage occurred and the attribution of that damage to one cause or another is one for the jury.

[127] This jury was properly charged that aggravated damages are not available for the fact of dismissal, but only for the unfair manner of dismissal. The only question for us should be whether there was any evidence upon which a properly charged jury acting reasonably could conclude that the stress suffered was attributable to the manner of dismissal.

[128] As noted, I am satisfied that there was, and I would dismiss the appellant's ground of appeal that the trial judge erred in leaving this issue with the jury.

[129] Having said that, I agree that the trial judge engaged in faulty reasoning which resulted in setting the upper range of damages far in excess of what would no doubt have been awarded absent that error. Thus, it is necessary to examine the quantum in view of the proper legal test. Recognizing that an award of aggravated damages is compensatory, and having regard to the evidence of actual harm, the award of $200,000 cannot stand.

[130] I find that previous authorities are not particularly helpful, as many predate the decision in *Honda Canada Inc v Keays*, 2008 SCC 39, [2008] 2 SCR 362 and, therefore, include reference to *Wallace* damages from the decision *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, 152 DLR (4th) 1, which extended the notice period as damages for conduct in the course of termination of employment. *Honda* made clear that no extension of the notice period is to be used to determine the proper amount of damages attributable to conduct in the manner of dismissal stating at para 59, "The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages."

[131] While in some cases an issue might be returned to a trier of fact for disposition based on an appropriate range of damages, that is neither practical nor appropriate here given the multi-issued nature of this lawsuit and the lapsed time. Moreover, it is unnecessary here as I consider that punitive damages are appropriate and aggravated damages must be considered when setting the amount of punitive damages. Thus, having regard to the evidence of actual damage here and keeping in mind that I am going to award punitive damages, I would set aggravated damages at $30,000.

II. Punitive Damages

[132] I agree with my colleagues that the trial judge did not err in leaving punitive damages with the jury. My point of departure, with respect, relates to quantum.

[133] The test for appellate intervention is, as noted by the majority, whether the award is wholly disproportionate or shockingly unreasonable, having regard to the fact that punitive damages should not go beyond that which is necessary to punish Home Hardware for its actions. Subsumed in that test is the question of whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant's misconduct: *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 at para 107.

[134] The trial judge advised the jury that the range was zero to $400,000. The appellants argue that this range was exorbitant, thereby contributing to the jury arriving at its quantum. Our task is to determine whether the jury award is wholly disproportionate or shockingly unreasonable, and went beyond what was necessary to punish Home Hardware.

[135] The instructions to the jury on punitive damages were modelled on the basis of instructions enunciated by the Supreme Court of Canada in *Whiten* at para 36. Thus, we must approach the issue of quantum on the basis that the jury understood the nature of punitive damages and the relevant principles it was required to apply when arriving at the quantum necessary to punish the conduct here. The jury was properly instructed on the need to ensure that punitive damages take into consideration all compensatory damages in determining whether there was a need for a further order of punitive damages and that punitive damages be limited to that required to punish.

[136] This jury awarded $300,000 for punitive damages in addition to the $200,000 award for aggravated damages. Nothing could more clearly indicate the jury's view of the defendant's unfair conduct in its manner of dismissal. Although the amount ordered for punitive damages in other wrongful dismissal cases is relevant, it is not determinative. This case must be viewed on its own merits and deference must be afforded the jury unless the award breaches the legal test. That test requires that we ask whether the jury's award of $300,000 punitive damages is wholly disproportionate or shockingly unreasonable to meet the need for damages to properly punish the offending party. If the award is so high it is shockingly unreasonable, then in my view, the question becomes: What is the greatest amount that could be ordered without rising to that level and thereby attracting appellate intervention, and we should order that amount. We should not substitute an average figure or what we, had we heard the case, might have awarded. In this way, at least some deference is afforded the jury's view of the conduct and its assessment of what is required for punishment rather than substituting our view. In short, if an amount would not breach the test for appellate intervention, that figure should be substituted even if we find it high. Just as we frequently

refuse to interfere when a jury orders low damages, we should attempt to honour the verdict here to the extent possible, even if the award is high.

[137] In my view, when the trial judge made the following comments at paras 28-29 he was attempting to do just that. He stated:

> To simply restrict one's self to decided cases as the Defendants have where aggravated or punitive damages were awarded is not to provide any meaningful Range for a Jury because it is fair to say in law that aggravated, and especially punitive damages, are exceptional forms of relief. By definition the decided cases, the vast majority of which are decided in Judge Alone trials, in their final result will greatly skewer any average given that aggravated and punitive damages are relatively seldom ever awarded.
>
> As such I conclude that a reverse analysis should be done. Quantum Awards by juries will generally stand up to appellant review unless they are so egregiously high that they are perverse and must be vacated. The high end of the Range to submit to this Jury should therefore limit this Jury to an award that is not perversely high in any circumstance of this case, without unduly restricting the Jury to award exceptional punitive damages if they see fit. Therefore I conclude that the Jury will be given the range of zero to $400,000 if they find that Home Hardware is liable for exceptional punitive damages.

The trial judge was saying that judicial awards of damages should not bind a jury. Rather, he chose to set an upper limit that could survive appellate review and allow the jury to award up to that amount, even if high.

[138] A jury decision represents the views of ordinary reasonable persons (peers) on a defendant's conduct. Here we have an opportunity to learn of the community's standards and view of the manner of dismissal. In arriving at its decision, a jury determines what is required in monetary terms to punish a particular defendant for its conduct, and in doing so brings to the table the common reasonable man's view of both the conduct involved and the value of money required to punish for that conduct. In *Cory v Marsh* (1993), 22 BCAC 118, 77 BCLR (2d) 248, Gibbs JA at para 52 described the very purpose of a jury is "to bring into the courtroom the standards and the common sense of the community."

[139] Therefore, I view the questions on punitive damages as two-fold: First, was the jury's award of $300,000 for punitive damages required to punish the defendant wholly disproportionate and shockingly high? Second, if so, what is the highest number that could be awarded that would not be disproportionate and shockingly high and therefore safe from appellate review?

[140] I accept the majority decision that where an award of punitive damages, when added to the compensatory damages, produces a total sum that is so "inordinately large" that it exceeds what is "rationally" required to punish the defendant, it can be set aside on appeal. I also accept my colleagues' assessment that an award of $300,000 is shockingly unreasonable as it relates to what is required to punish taking into consideration all of the circumstances and damages here.
[141] The next step, in my view, is to ascertain the high end of an award that would not breach the test of shockingly unreasonable and substitute that amount. I say that because it is important to honour the jury's assessment of facts and circumstances to the extent possible. Otherwise, we undermine the jury. Most importantly we fail to benefit from the insight a jury brings to both the community view of certain types of conduct and the amount necessary to deter or punish such conduct. Viewed in the worst light, the conduct here was serious, ranging from bias, pre-conceived ideas, total insensitivity, vindictiveness, manipulation and perhaps even intentional actions by a manager to protect his daughter from any blemish on her record by removing the person who wrote a negative performance assessment – an assessment that disappeared. The jury could clearly have viewed th evidence here as being very deserving of a serious punitive damage award.

[142] In my view, an award of $75,000 totally undermines the jury's assessment of both the defendant's conduct and what would be required to punish this company. The jury was prepared to order $300,000 in circumstances where it had already ordered $200,000. It follows that the jury would no doubt have ordered the higher end of any reasonable amount. In my view, an assessment of $75,000 fails to take into account how the jury views such an award.

[143] I am also satisfied that had the jury awarded $30,000 aggravated and something significantly higher that $75,000, such an award would be shockingly unreasonable. The difficulty arises when trying to assess when the shockingly unreasonable benchmark is met. In determining this question, it is important to note that the range of punitive damages is great. As noted by my colleagues, a punitive damage award of $l,000,000 was upheld in a non-employment case, *Whiten*. A recent award for punitive damages resulting from a wrongful dismissal action was granted in the sum of $100,000 which was in addition to an award of damages for extreme humiliation, embarrassment and loss of enjoyment of social activities damages of $50,000 and intentional infliction of mental distress of $20,000: *Downham v Lennox and Addington (County),* [2005] OTC 1025, 56 CCEL (3d) 112 (SCJ).

[144] The fact that past authorities have ordered lesser amounts in unjust dismissal cases is not determinative here where we are dealing with a jury assessment of the circumstances of this particular case. The conduct in this case could easily be found to engage the punitive damage principles rationally requiring punishment. Although there was a compensation award for failure to give notice, those damages relate to that failure and should not be used to diminish punishment for the totally unrelated, and deliberate behaviour engaged here. The compensation award for unjust dismissal was Elgert's legal entitlement for Home Hardware's failure to give notice and not the conduct here. On this evidence, it would have been possible to conclude that the goal was to remove Elgert at all costs and one should not encourage employers to try to fire without notice, and leave an employee to litigate. Similarly, the damages for defamation were not payable by Home Hardware

and therefore do not act as punishment for that defendant. The amount awarded for aggravated damages should, of course, be considered.

[145] In my view, had the jury awarded $30,000 for aggravated damages and another $150,000 for punitive damages, it would be difficult to suggest that such an award for this conduct and this defendant would attract appellate review. That is especially true if the jury viewed the scenario here as a set up to protect the daughter from a negative review that never surfaced following Elgert's termination.

[146] I accept, however, that anything in excess of that amount might attract appellate interference for being wholly disproportionate or shockingly beyond that which was required to punish, having regard to the principles relating to punitive damages. That being the case, I would, in an effort to support the jury's view of the conduct and the value of money, impose that amount rather than conduct a fresh assessment of what I might have awarded had I been the finder of fact.

[147] Accordingly, I would dismiss the appeal with the following exceptions: aggravated damages are lowered to $30,000; punitive damages are lowered to $150,000.

Appeal heard on November 30, 2010

Memorandum filed at Edmonton, Alberta
this 26th day of April, 2011

"as authorized" Conrad J.A.

Appearances:

D.L. Pentelechuk, Q.C.
for the Respondent

D.D. Risling
for the Appellants