

Executive Employment

a journal devoted to employment and related contract, dismissal and liability issues

Volume XVII, No. 4

2012

Highlights

WRONGFUL DISMISSAL

punitive damages on the increase

In its recent decision in *Pate v. Galway-Cavendish and Harvey (Township)*, the Ontario Superior Court of Justice awarded \$550,000 in punitive damages to a wrongfully dismissed municipal employee falsely accused by his employer of theft. This is the largest sum ever awarded in Canada in connection with a wrongful dismissal. The award – granted to the former employee in addition to substantial severance and aggravated damages equivalent to more than three years' compensation – serves as a stark reminder of the potential consequences if an employer mishandles and fails to investigate properly allegations of employee criminal behaviour. Joe Conforti reviews the decision in *Pate* and its implications. The author also provides recommended steps for employers to minimize risk in the dismissal process, and in any workplace investigation.

1010

BENEFITS AND POLICIES

the right to change post-retirement benefits

Many employers provide benefits to employees for their retirement ("post-retirement benefits"). Some employers provide the benefits as part of the benefit package to an employee in order to recruit the employee to work for the employer. Some employers provide the benefits for other reasons. However, an employer's economic circumstances may change and the employer may wish to eliminate or reduce the post-retirement benefits provided. As Bruce Grist explains, the decision of the British Columbia Supreme Court in *Lacey v. Weyerhaeuser Company Limited* identifies that if the employer has not properly reserved the right to amend or terminate the benefits, employees who have received such offers may be entitled to require the employer to continue the benefits.

1017

PRIVACY

privacy in the workplace – Jones v. Tsige

Laurie Robson analyzes the impact of the Ontario Court of Appeal's judgment in *Jones v. Tsige*, and offers timely advice to employers on issues arising out of access to personal information and steps that should be taken to limit risk. As the author notes, employers now face new exposure for the improper collection, use or disclosure of personal information, and vicariously, for the breaches of workplace privacy by their employees absent effective policies and practices.

1020

Board

Matthew L. Certosimo
Editor-in-Chief
Borden Ladner
Gervais LLP
Toronto

Robert Bonhomme
Heenan Blaikie LLP
Montreal

Joe Conforti
Goodmans LLP
Toronto

Eric Durnford, QC
Ritch Durnford
Halifax

Jamie Eddy
Cox & Palmer
Fredericton

Bruce R. Grist
Fasken Martineau
DuMoulin LLP
Vancouver

Brian J. Kenny, QC
MacPherson, Leslie
& Tyerman LLP
Regina

Janice B. Payne
Nelligan O'Brien
Payne LLP
Ottawa

Laurie M. Robson
Borden Ladner
Gervais LLP
Calgary



WRONGFUL DISMISSAL

Punitive Damages on the Increase: Ontario Court Awards \$550,000 to Wrongfully Dismissed Employee

Joe Conforti
Goodmans LLP

Punitive damages are available in breach of contract cases, including to wrongfully dismissed employees.¹ However, they are uncommon and, even when awarded, have tended to be for comparatively modest amounts, rarely exceeding \$50,000.²

In its 2008 decision, *Honda Canada Inc. v. Keays*, the Supreme Court of Canada endorsed this cautious approach. In quashing a then record-setting \$500,000 wrongful dismissal punitive damages award, the Court said that resort to punitive damages should be reserved for “exceptional cases” where there is an “independent actionable wrong” (that is, apart from the breach of contract/wrongful dismissal itself) and where the misconduct is so “harsh, vindictive, reprehensible and malicious ... [and] extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.”³

This cautious approach may be changing, most significantly in the quantum of punitive damages available to dismissed employees who have been harshly treated.

¹ *Vorvis v. Insurance Corp. of B.C.*, [1989] 1 S.C.R. 1085.

² See, e.g., “Chart of Aggravated and Punitive Damages,” in Mole, *Wrongful Dismissal Practice Manual* (2d. ed.) at Ch. 9, App. A.

³ [2008] 2 S.C.R. 362 (“*Honda*”), at paragraphs 62 and 68.

In *Pate v. Galway-Cavendish and Harvey (Township)*,⁴ the Ontario Superior Court of Justice awarded the plaintiff \$550,000 in punitive damages, the largest amount ever awarded by a trial judge in a Canadian wrongful dismissal case.

Background

The facts in *Pate* are straightforward:

- The plaintiff, John Pate, worked for the Township of Galway and Cavendish as its Chief Building Inspector from 1989 until its amalgamation with the Township of Harvey on December 31, 1998. Following amalgamation, Mr. Pate became a building inspector for the newly formed Township.
- A few months after amalgamation, on March 26, 1999, Mr. Pate was called into a meeting with his new supervisor, John Beaven, a retired police force veteran of 27 years who had been the Chief Building Official for the Township of Harvey immediately prior to amalgamation. Mr. Pate was told that discrepancies had been uncovered with respect to the Township’s building permit fees and that he was to blame. Mr. Pate asked for but was refused details of the alleged discrepancies; Mr. Beaven told him that “the fact that they existed was all that mattered.”
- Mr. Pate was told that if he submitted his resignation, the Township would not contact the police. Although Mr. Pate was, therefore, not given an opportunity to respond to specifics, he denied any wrongdoing and offered to call the police himself. When Mr. Pate refused to resign, the Township dismissed him, requiring him to clean out his desk immediately.
- At the time of his dismissal, Mr. Pate was 43-years old; he had been employed with the Township for ten years, earning a salary of \$34,100.
- The next month, April 1999, Mr. Beaven contacted the Ontario Provincial Police. Mr. Beaven initially reported four cases of alleged theft of building permit fees by

⁴ CanLII 70502 (Ont. S.C.) (the “Initial Trial Decision”), appeal allowed, 2011 ONCA 329 (the “Appeal Decision”); 2011 ONSC 6620 (the “New Trial Decision”).

Mr. Pate, providing the police with statements he had prepared following his own investigations in relation to the missing fees. Ultimately, Mr. Beaven provided the police with statements relating to six different properties.

- Mr. Pate was charged with theft relating to missing building permit fees for four properties.
- During the criminal trial, Mr. Pate provided reasonable explanations for what had happened to the missing building permit fees:
 - Some of the property owners paid their fees at a satellite office operated by the Township. Many of those files had later been lost – presumably by the Township – during an office move.
 - In another case, the fees were recorded under a name different from that of the property owner because they were received from the owner's son-in-law. This had been recorded by Mr. Pate in a journal that he maintained as a part of his job and which entries had been regularly reconciled by the Township.
 - Several years earlier, in 1995, the Township had investigated the fees for one of the properties in question and found no wrongdoing on the part of anyone.
- The Township, primarily Mr. Beaven, was aware of Mr. Pate's explanations at the time that the Township brought its allegations to the police. However, no municipal employee revealed any of them to the police during its investigation despite their being "well-known." Moreover, at the time of dismissal, Mr. Beaven had seized the journal in which Mr. Pate had recorded his transactions. None of this relevant and exculpatory evidence was ever provided to the police. It was conceded that, had the police known of such evidence, criminal charges would not have been laid.
- Given his former public position and the small community, the criminal trial garnered considerable local media attention, often making headlines in the local newspaper.

- Mr. Pate's criminal trial was heard over four days spread spanning a one-year period. On December 17, 2002 – over three years after his dismissal – Mr. Pate was acquitted of all charges.
- In the interim, Mr. Pate's marriage ended; he lost his family business; and he had been unemployed for about two years.
- After his acquittal, Mr. Pate brought an action against the Township for wrongful dismissal and for malicious prosecution.
- At the commencement of the civil trial, the Township conceded that Mr. Pate was wrongfully dismissed. The parties agreed on a 12-month notice period without prejudice to Mr. Pate's right to litigate his remaining claims.

The Initial Trial

Malicious Prosecution

The trial judge dismissed Mr. Pate's claim for malicious prosecution.

According to the trial judge, Mr. Pate needed to demonstrate that the Township had initiated the failed prosecution against him, that it had no reasonable and probable grounds to do so, and that it intended to subvert or abuse the criminal justice system.

There was no question that the Township had initiated the investigation of Mr. Pate and brought the allegations to the attention of the police as a complainant. According to the trial judge, however, the Township did not initiate the prosecution as the final decision to charge Mr. Pate and to pursue the prosecution was that of the police.

Further, the trial judge was of the view that he could not legally infer that the Township had acted with an improper purpose and with malice; rather, this needed to be proved by direct evidence. According to the trial judge, the Township's failure to disclose relevant evidence to the police amounted merely to "incompetence, honest mistake, negligence or even gross negligence;" although the Township's conduct "came very close," it did not support a determination of malicious prosecution.⁵

⁵ Initial Trial Decision, at paragraphs 55-63.

EXECUTIVE EMPLOYMENT

Damages

Notwithstanding the dismissal of the claim for malicious prosecution, the trial judge considered the Township's actions in pursuing criminal charges against Mr. Pate in his assessment of damages arising from Mr. Pate's wrongful dismissal. As a result of the Township's conduct in this regard, the trial judge awarded the following damages to Mr. Pate (all in addition to the 12-months' severance agreed upon).

Additional Severance of Four-months' Compensation

This award, relying on *Wallace v. United Grain Growers Ltd.*,⁶ was on the basis that the Township's actions constituted "bad faith" or "unfair dealing" in the manner of Mr. Pate's dismissal. Factors relied upon by the trial judge included: the Township's unsubstantiated denial of its offer of clemency in exchange for a resignation by Mr. Pate; the accusation of theft and ultimate acquittal of Mr. Pate; the Township's lack of notice to and discussion with Mr. Pate with respect to the allegations; and the continued reliance by the Township on the criminal allegations up to the date of trial.⁷

Special Damages of \$7,500

This award reimbursed Mr. Pate for out-of-pocket legal costs incurred to defend himself against the unwarranted criminal charges.

Aggravated Damages of \$75,000

This award – more than twice Mr. Pate's annual compensation – was on the basis that the Township's actions had been "reprehensible," "high-handed," "outrageous," "malicious" and "oppressive." The trial judge cited various factors:⁸

- Mr. Pate was forced to undergo the ordeal of a four-day criminal trial over a one-year period.
- The trial was widely reported within a small community.

- Mr. Pate was devastated emotionally and financially, his marriage ended, he lost his employment and his family business and, given the nature of the allegations levelled against him, he could not seek employment with another municipality.
- Although initially denied by the Township, the Township admitted that it had proposed to Mr. Pate that the Township would not call for criminal charges in exchange for his resignation.
- The Township terminated Mr. Pate without any advance notice as to the reasons for his dismissal, reasons that it ultimately conceded were groundless. Indeed, the Township apparently decided first to dismiss him and then to mount an investigation in order to build a case to justify the action it had already taken.
- The Township failed to disclose information to the police, which would have resulted in no charges being levelled against Mr. Pate in the first place.
- The Township put forward various grounds for misconduct in its statement of defence, none of which were proved – or even pursued – at trial and yet, which were never withdrawn.

Punitive Damages of \$25,000

The trial judge opined that the Township's withholding of exculpatory evidence from the police was egregious, especially as the police acknowledged that no criminal charges would ever have been laid had the evidence been disclosed. The trial judge determined that punishment was warranted as the Township's conduct relating to Mr. Pate's dismissal was in "bad faith" and "amounted to the intentional infliction of mental distress and social and economic damage." As such, Mr. Pate was entitled to compensation for "humiliation, embarrassment and damage to his self-worth and self-esteem."⁹

In quantifying punitive damages, the trial judge said: "I would order more, however, I am bound by the principles of proportionality."¹⁰ The trial judge did not explain the

⁶ [1997] 3 S.C.R. 701.

⁷ Initial Trial Decision, at paragraph 54.

⁸ Ibid. at paragraphs 64-70.

⁹ Ibid. at paragraphs 76 and 77.

¹⁰ Ibid. at paragraph 81.

manner in which the proportionality principles constrained him nor did he indicate how much more he would have awarded in the absence of such principles.

The Appeal Decision

Mr. Pate appealed on two issues:

1. Did the trial judge err in failing to find the Township liable to Mr. Pate for malicious prosecution?
2. Did the trial judge err in assessing Mr. Pate's punitive damages at only \$25,000?

Malicious Prosecution

The Court of Appeal reiterated the necessary elements, which must be proved for a plaintiff to succeed in an action for malicious prosecution: (a) the proceedings must have been initiated by the defendant; (b) the proceedings must have terminated in favour of the plaintiff; (c) the absence of reasonable and probable cause; and (d) malice or a primary purpose other than that of carrying the law into effect.¹¹

The Court of Appeal determined that the trial judge made three errors in his analysis.

The first mistake was that the trial judge set the threshold for proving malice too high. The trial judge concluded that he could not simply draw an inference of malice from the surrounding circumstances and the absence of reasonable and probable cause considered objectively; instead Mr. Pate was required to establish positively that the Township intended to subvert or abuse the criminal justice system. The Court of Appeal said that this high standard was appropriate with respect to proving malicious prosecution as against a Crown attorney as the judiciary should not review prosecutorial discretion so long as the Crown attorney acts within his or her proper role as a minister of justice. However, the same considerations do not apply where the action is against a private individual. As a result, the trial judge could and should have drawn inferences from the evidence.¹²

The second mistake consisted of the trial judge making findings about malice when

addressing damages for wrongful dismissal that were inconsistent with his findings when considering the Township's liability in relation to malicious prosecution. For example, in awarding aggravated and punitive damages, the trial judge emphasized facts (such as, the Township's failure to disclose exculpatory evidence), which demonstrated a distinct lack of reasonable and probable grounds to support the prosecution of Mr. Pate. The trial judge's finding of "reprehensible conduct" and the Township's "departure to a marked degree from ordinary standards of decent behaviour" demonstrated more than mere negligence on the Township's part and was evidence from which one could readily infer wilful and knowing withholding of exculpatory evidence from the police.¹³

The trial judge's third error related to the first part of this task for malicious prosecution – namely, that the plaintiff must prove that the prosecution was "initiated" by the defendant. The Court of Appeal disagreed with the trial judge's conclusion that this referred solely to the actual laying of criminal charges. In circumstances where the Township wilfully and knowingly withheld exculpatory information from the police that the police could not have been expected to find – and where Mr. Pate would not have been charged but for the intentional withholding of evidence – the Township could be said to have "initiated" the prosecution.¹⁴

As a result of these errors, the Court of Appeal ordered a new trial concerning Mr. Pate's claim for malicious prosecution. This new trial would focus primarily on whether the Township, through Mr. Beaven, knowingly withheld exculpatory information and whether Mr. Beaven prepared his statements in a manner that misled the police into not conducting their own search of relevant records.

Punitive Damages

The Court of Appeal noted that the trial judge made findings of serious misconduct by the Township – findings that were not challenged on appeal – that lasted over a lengthy period and that had a devastating impact on Mr. Pate's life. However, while

¹¹ Appeal Decision, at paragraph 27.

¹² Ibid. at paragraphs 29-39.

¹³ Ibid. at paragraphs 40-45.

¹⁴ Ibid. at paragraphs 46-50.

EXECUTIVE EMPLOYMENT

noting the “principles of proportionality,” the trial judge gave no explanation whatsoever for his conclusion that a higher award of punitive damages would offend such principles nor what amount of punitive damages the trial judge was considering as otherwise appropriate. It was not apparent to the Court of Appeal why a higher award of punitive damages would not have been appropriate given the evidence. As the trial judge’s reasons were so sparse as to be not susceptible to appellat review, a new trial was required.¹⁵

The Court of Appeal further noted that the trial judge’s award of \$25,000 on account of punitive damages related to Mr. Pate’s claim for wrongful dismissal. If Mr. Pate was successful on the new trial ordered in connection with the malicious prosecution, the trial judge was also mandated to consider all heads of damages arising from the conduct giving rise to that claim, including punitive damages.¹⁶

The New Trial

On November 7, 2011, the new trial was heard before the same trial judge, some 12 ½ years following Mr. Pate’s wrongful dismissal. Unfortunately, by this time, Mr. Pate could not participate as he had died shortly after the Court of Appeal decision.

The new trial proceeded only with respect to the reconsideration of the quantum of punitive damages; it did not address the liability of the Township for malicious prosecution.

The judge considered the rationale for punitive damages as follows:

[A]ny award of punitive damages, when added to compensatory damages, must produce a total sum which is rationally required to punish the defendant. The amount of the award must be proportionate to the blameworthiness of the defendant’s conduct such that the more reprehensible the conduct, the higher the rational limits to the potential award.¹⁷

The trial judge revisited the Township’s misconduct, all of which had serious, long-

lasting and detrimental consequences for Mr. Pate. The trial judge reiterated that the Township’s misconduct was intentional and the resulting harm “foreseeable,” concluding:

[P]unitive damages are intended to serve the societal purpose of punishing a wrongdoer in order to deter others from similar misconduct in the future. In short, such damages constitute a fine for conduct deemed worthy of punishment and, as such, provide a “windfall” for the plaintiff. There is no doubt, in my mind, that the defendant’s conduct in this matter justified awarding such punitive damages.¹⁸

On reconsideration of the same facts before him at the initial trial and following a review of a few high water punitive damages awards in other cases, the trial judge greatly increased his original assessment of punitive damages, fixing them at \$550,000.

Comments and Conclusions

It is unlikely that the new trial’s dramatic 22-fold increase in the quantum of punitive damages was what the Court of Appeal had in mind when it remitted the matter for reconsideration. After all, when the appellate court was last faced with a similar issue in *Honda*, it determined that the trial judge’s \$500,000 punitive damages award in connection with the plaintiff’s wrongful dismissal was excessive and so, reduced it to \$100,000; even that reduced award was later wholly quashed by the Supreme Court of Canada as being, amongst other things, disproportionate to the amount of compensatory damages.

Some comments follow:

- The Court of Appeal remitted the matter to the trial judge in part based on the lack of clarity on the issue of “the principles of proportionality.” According to the Supreme Court of Canada, proportionality is to be assessed considering factors including other civil and criminal penalties, which have been or are likely to be inflicted on the defendant for the same misconduct and whether any advantage was wrongfully gained by the defendant from its misconduct.¹⁹ Even after the

¹⁵ *Ibid.* at paragraphs 57-62.

¹⁶ *Ibid.* at paragraph 56.

¹⁷ New Trial Decision, at paragraph 8.

¹⁸ *Ibid.* at paragraph 10.

¹⁹ *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, at paragraph 109.

re-trial in *Pate*, liability against the Township for malicious prosecution has apparently been left open. Without a final determination, it is difficult to assess whether there could be other penalties likely to be inflicted on the Township for the same misconduct.

- Punitive damages are rational only if compensatory damages are inadequate. In this case, Mr. Pate was awarded substantial damages for wrongful dismissal (including a *Wallace* “bump-up”) as well as significant aggravated damages designed to compensate the plaintiff for damages caused by the Township’s reprehensible, outrageous, high-handed and oppressive misconduct and for the “natural indignation of right-thinking people arising from the malicious conduct” of the Township. There was no analysis as to why the substantial damages already awarded would be an insufficient deterrent. Also, the Township’s misconduct relied on in support of punitive damages are largely the same so that there is an element of double compensation.
- Even if a significant award of punitive damages was appropriate, the quantum in *Pate* appears disproportionate to awards in previous wrongful dismissal cases. It should be noted that none of the precedents reviewed and relied upon by the trial judge were wrongful dismissal cases; in fact, the most similar decision relied on by the trial judge related to a jury award in conjunction with a finding of malicious prosecution²⁰ – a determination expressly not made in *Pate*. Moreover, the precedents happen to be the three largest punitive awards in Canadian history and were all made before the Supreme Court of Canada’s 2008 restatement of the law in *Honda*.
- In his reconsideration, the trial judge never stood back and looked at the totality of the damages he had already awarded, and never explained why the compensatory

damages were inadequate.”²¹ After all, the damages already awarded to Mr. Pate for his wrongful dismissal exceeded three-years’ compensation; the trial judge’s punitive damages added the equivalent of another sixteen-years’ compensation.

As a result, the last word in *Pate* has likely not yet been heard and the Township has sought leave to appeal to the Supreme Court of Canada. Regardless of the final outcome, however, *Pate* is a reminder to employers of the potentially dire consequences of mishandling allegations of employee criminal behaviour. Recommended steps for employers to minimize risk include the following:

1. Each step in the dismissal process, including any investigation, should be taken carefully and with the advice of counsel.
2. An investigation must be conducted fairly, reasonably and impartially. For serious matters, consider the use of an external investigator, for example, a lawyer.
3. Be as certain of the facts as possible. An employer should not make a decision to terminate for just cause and then build its case. Rather, if an investigation is needed to ascertain the facts, this should be done even if it requires an interim suspension of the employee.
4. Ensure that all individuals with information relevant to the investigation are interviewed as witnesses. This includes the affected employee, who must be given the reasons for the investigation and a fair opportunity to respond.
5. Consider whether the allegations are serious enough to warrant police involvement or whether the matter is best handled internally or through the civil litigation process.
6. When theft or other criminal activity by the employee is suspected, provide all information to the police; this includes inculpatory and exculpatory evidence – nothing can be withheld.

²⁰ *McNeil v. Brewers Retail Inc.*, [2008] O.J. No. 1990 (C.A.). The other two cases related to insurance, namely, *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, and defamation, namely, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

²¹ *Greater Toronto Airports Authority v. Public Service Alliance Canada Local 0004*, 2011 ONSC 487 (Div. Ct.), at paragraph 126.

EXECUTIVE EMPLOYMENT

7. An employer should not take steps to influence a police investigation or the decision by the police or Crown attorney to prosecute the employee for criminal misconduct.
8. An employer's ultimatum to the effect of "resign or the police will be called" is inappropriate. Such a forced resignation does not protect an employer from a wrongful dismissal action and may be seen as an abuse of process.
9. If an allegation cannot be proved, it should be withdrawn immediately or, at the very least, the employee should be advised that it will not be pursued. If litigation ensues and the employer learns that it is wrong, it should acknowledge its error and, where appropriate, an apology should be issued.