COURT OF APPEAL FOR ONTARIO

CITATION: Render v. ThyssenKrupp Elevator (Canada) Limited, 2022 ONCA 310
DATE: 20220420
DOCKET: C67826

Feldman, Pepall and Tulloch JJ.A.

BETWEEN

Mark Render

Plaintiff (Appellant)

and

ThyssenKrupp Elevator (Canada) Limited

Defendant (Respondent)

Chris Foulon and Behzad Hassibi, for the appellant

David G. Cowling and Alexander J. Sinclair, for the respondent

Heard: October 12, 2021 by video conference

On appeal from the judgment of Justice William S. Chalmers of the Superior Court of Justice, dated November 27, 2019 and March 30, 2020, with reasons reported at 2019 ONSC 7460, and from the costs judgment, dated November 27, 2019 and March 30, 2020.

Feldman J.A.:

Overview

[1] The appellant employee appeals from the judgment that upheld his dismissal for cause by the respondent employer. The appellant was a 30-year employee in a managerial role. His dismissal followed a single incident that

occurred in the workplace where the appellant slapped a female co-worker on her buttocks. The trial judge found that the incident caused a breakdown in the employment relationship that justified dismissal for cause.

[2] In appealing the conclusion that there was just cause, the appellant disputes two of the trial judge's factual findings – specifically, that the appellant's contact with his co-worker was not accidental and that the appellant's remorse was not genuine. The appellant also submits that the trial judge erred in law in concluding that there was just cause. He argues that there was no breakdown in the employment relationship and the respondent failed to consider other disciplinary measures before terminating his employment.

[3] In addition, the appellant seeks a finding that he is entitled to benefits under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("*ESA*"), an issue that was not addressed by the trial judge. He also appeals from the trial judge's failure to award punitive damages for the independent actionable wrong arising from the respondent's litigation conduct, or in the alternative, he seeks leave to appeal the award of costs, which the trial judge used to address the litigation misconduct.

[4] For the reasons that follow, I would dismiss the appeal from the finding that there was no wrongful dismissal and the award of no punitive damages, but I would allow the appeal with respect to the *ESA* entitlement and the costs.

Factual Background

[5] The appellant began working at his father's elevator company in 1984, and was president of the company when it was sold to the respondent in 2002. Under the new ownership, the appellant was made operations manager of the Mississauga office in 2005, and continued in that role until his employment was terminated in 2014. As operations manager, he was responsible for the service operations of the company with 4 people reporting directly to him and 40 technicians and mechanics reporting indirectly. He was also involved in hiring and training.

[6] At the time of the incident, Linda Vieira – the co-worker who was slapped by the appellant – was an accounts manager in the Mississauga office. As the accounts manager, she reported to Gary Platt, the office manager. Although Ms. Vieira did not report to the appellant, she worked with him in what was a relatively small office with only 13 employees – 10 men and 3 women. Also, when Mr. Platt was away, the appellant was responsible for the office.

[7] There was a very social atmosphere in the Mississauga office, including lunches and other events and regular joking and bantering. The appellant described it as a friendly and joking environment that he fostered to reduce stress.

[8] This atmosphere included inappropriate jokes. One of the men, Leo Daniel, made sexist and offensive comments to or about Ms. Vieira. The male workers

would occasionally tap each other on the buttocks and say “good game” as if they were football players on the field or in the locker room. The women employees, including Ms. Vieira, were not included in this activity.

[9] The appellant and Ms. Vieira would engage in jokes and banter, including Ms. Vieira making jokes or teasing the appellant that he was short and not as good-looking as his brother. On at least one occasion, she jokingly punched him in the arm. On another occasion, she gave him a holiday party gift of an apron with a muscular man in underwear on it, again as a joke. For his part, in an email exchange in May 2013, Ms. Vieira asked the appellant if he would like her to bring anything to him at his hotel and he responded, “That’s a loaded question.” On another occasion, she was asked to bring a clean shirt to a job site for the appellant. When she arrived, she saw him with his shirt off and parked away from him. The appellant emailed Ms. Vieira, “I heard you were afraid to see me topless” and she replied, “not afraid, just inappropriate”. The appellant and Ms. Vieira occasionally saw each other at the gym where they both worked out. He thought they were friends. She testified that she participated in the joking and bantering so that she would not be ostracized and so that she would be respected.

[10] On February 20, 2014, the respondent presented its newly introduced Anti-Harassment and Anti-Discrimination Policy by way of a PowerPoint presentation and discussion. Both the appellant and Ms. Vieira attended the presentation. The policy states that the respondent has “zero tolerance” for

harassment and discrimination, provides that sexual advances and touching are considered sexual harassment, states that sexual harassment can arise from a single incident and may include public humiliation, and states that an employee who engages in conduct that is contrary to the policy will be subject to appropriate discipline, up to and including termination of employment.

[11] In addition to the Anti-Harassment and Anti-Discrimination Policy, the respondent had implemented a Progressive Discipline Process Policy in October 2011, which was revised in August 2012. The progressive discipline under this policy would "[t]ypically" begin with coaching, move up to a verbal warning, then a written warning, final warning with suspension, and termination. The policy also provides that where the misbehaviour is of a severe nature, the progressive discipline can be accelerated to match the violation. As a supervisor, the appellant was required to know and implement the policies, and he confirmed that he was familiar with them before the incident in question.

[12] The incident that led to the appellant's dismissal occurred on February 28, 2014. It took place in one of the employee offices around 2:00 p.m. Six employees were present, four of whom testified at the trial, including the appellant and Ms. Vieira. A fifth employee's will-say statement was also admitted into evidence for the truth of its contents, although he was not called as a witness. The five versions differed in some details, requiring the trial judge to make findings regarding what occurred.

[13] Although one man was on the phone, the others were speaking to each other loudly and jokingly. Mr. Daniel commented on a stain on Ms. Vieira's blouse by asking if she was lactating. The appellant said that Ms. Vieira made a comment about the work boots he was wearing, then stood on the toes of his boots, leaned in, and said, "you're short", all of which she denied. One of the other men corroborated that she said, "you're short" but none of the others present testified that she stood on the appellant's boots. Ms. Vieira said that she stood beside the appellant, stood up tall on her high heels, and looked down on him as a non-verbal joke about his height.

[14] The trial judge found that Ms. Vieira made either a verbal or non-verbal joke about the appellant's height. The appellant described what happened next. He responded to the comment "you're short" by saying, "yes I am", crouching down while about 12 inches from her, and saying, "this is how short I am when I take my boots off". He then went down on his knees, crouching in front of her with his face close to her breasts for two to three seconds. Everyone including Ms. Vieira was laughing.

[15] Then the man on the phone finished his call and the appellant, who was waiting to speak to him, told everyone to leave. As he was getting up from his knees, he made a sweeping gesture with his right hand, intending to tap Ms. Vieira on the hip and said, "get outta here". However, he testified that he either lost his

balance or she turned, with the result that his hand touched her buttocks. When that happened, he said, “good game”.

[16] Ms. Vieira’s response changed the atmosphere in the room. She gasped, said that what he did was not okay, and that she could not believe he had done it. He asked if she was serious, and why she was upset when she had previously punched him in the arm. She responded that that was different because “you hit me on a private sexual part of my body.” He said that she could not punch him in the shoulder anymore, then he apologized, and said it would not happen again. Ms. Vieira denied that he apologized at this time.

[17] Ms. Vieira documented what occurred immediately afterward in two emails to herself and her husband. In between, she reported the incident to her manager, Mr. Platt, telling him that she wanted the appellant to apologize. I reproduce the two emails here because they were made contemporaneously, and were used by the trial judge to make his findings:

> We were joking around that he is short and I was taller than him. He was bending down pretending to be shorter and was coming up to my breasts, getting close … I was backing up from him, but he kept on invading my personal space. We were laughing about it. But he took it a step too far and actually spanked me on my butt. I couldn’t believe it and I told him that it was inappropriate. It was very awkward. He said that I’ve punched him in the shoulder before as if it’s an excuse. I said, no, it’s not the same thing as that was my private part. Present to witness this was Joe F., Leo D., Larry S., and Mario M.
>
> …

> I was thinking about this and I felt upset. I don't want the other men in the office to think it is OK to do that to me so I decided to talk to my Manager about it. I went into Gary Platt's office and told him what happened. I advised him that [the appellant] crossed a line and that it shouldn't have happened … not appropriate. He asked me what I wanted him to do about it and I said that it was OK for him to talk to [the appellant] about it. And that [the appellant] would need to apologize to me.

[18] For his part, the appellant went back to his office, distraught at what had just happened. Two of the men who had witnessed the incident came to his office where they discussed what had occurred. During the discussion, either Mr. Daniel asked what it felt like to "touch her ass" or the appellant asked who wanted "to touch the hand that slapped [her] ass". However the topic arose, the appellant admitted that he said, "for 10 bucks you can shake my hand."

[19] About ten minutes later, the appellant made eye contact with Ms. Vieira from the hall while she was in her office, made a gesture like he was slapping his hip, then went into her office. She said he should not have done that, in reference to hitting her buttocks, and he responded that it was a joke. She said it was no joke because he had hit her on her private parts. He responded that it was not sexual and that he was not trying to sleep with her. He then apologized. He believed that she accepted his apology, but she testified that he did not seem sincere.

[20] A few minutes later, when the appellant was in the hallway near Mr. Platt's office, Mr. Platt called him in and thanked him for apologizing to Ms. Vieira, as she expected an apology.

[21] Upset about what had happened, the appellant decided to leave early at 3:45 p.m., but ran into two other employees on the way out. One asked what was wrong and they had a cigarette in the parking lot where the appellant demonstrated what had happened by crouching and making a swatting motion. He told them he had tapped Ms. Vieira in a playful way and expressed regret.

[22] Unfortunately, Ms. Vieira observed the meeting from her office window and perceived that she was being mocked by the appellant, although she agreed in cross-examination that there was no laughing or high-fiving. She immediately reported her observations to Mr. Platt who sent an email to all the people who had been in the room when the incident took place and in the parking lot afterward, saying that what occurred could not happen again and that the matter should be put to rest. The appellant saw the email when he arrived home and called Mr. Platt. He told Mr. Platt that the incident was a joke that went badly.

[23] At the start of the following week, on March 3, Ms. Vieira advised Mr. Platt that she had decided to report the incident to HR. Mr. Platt responded by arranging a meeting that day in the boardroom with the appellant and Ms. Vieira. The appellant apologized again, but Ms. Vieira felt it was insincere and requested that a letter go into the appellant's file and the matter be reported to HR. In fact, she made a formal complaint to HR that day.

[24] She also described what had occurred to Gary Medeiros, the vice-president of Central Canada for the respondent company who oversaw the branch and was working in the Mississauga office that day. He spoke with one of the men who had been present, who described both the incident where the appellant hit Ms. Vieira and the later comment that he could shake his hand for $10.

[25] The next day, March 4, the HR manager Sarah Cleveland attended at the Mississauga office to carry out an investigation. She interviewed the appellant, Ms. Vieira, and others who had been present when the incident occurred. She advised the appellant that he may receive a letter in his file, suspension or termination, and that she viewed the incident as sexual harassment. Becoming concerned for his job, the appellant told Ms. Cleveland about prior incidents in which Ms. Vieira had punched him in the arm and she and others had made anti-Semitic comments to him. On March 5, he filed a formal complaint with HR against Ms. Vieira and the company regarding these incidents.

[26] After Ms. Cleveland reported the results of her investigation to Mr. Medeiros, they made the decision to terminate the appellant's employment. Mr. Medeiros testified that the decision was based solely on the incident in which the appellant touched Ms. Vieira on the buttocks.

[27] On March 6, the appellant and Mr. Medeiros had lunch with a client. The appellant left the lunch early to meet with Ms. Cleveland. Shortly after he arrived,

Mr. Medeiros arrived and the appellant was handed a termination letter. He was given no severance, termination, or vacation pay.

Findings of the Trial Judge

[28] Given that the appellant challenges both the trial judge's factual findings and his legal analysis, I will describe the trial judge's decision in some detail.

(1) Discrepancies in the Testimony at Trial

[29] The trial judge had to resolve some discrepancies in the accounts of what occurred at various stages in the narrative. The first was with regard to what had occurred in the office between the appellant and Ms. Vieira before he touched her buttocks. Ms. Vieira claimed in court that the appellant's face was one inch from her breasts and that he moved his head back and forth and made a sound like a motorboat. The appellant denied this and was supported by one of the witnesses. The other witness, Mr. Daniel, supported Ms. Vieira's version.

[30] The trial judge rejected Ms. Vieira's account because it was inconsistent with the two emails she had written immediately following the incident and what she told Mr. Platt. He also rejected Mr. Daniel's evidence, as he had included this part of the incident for the first time after reading the press interview that Ms. Vieira gave during the trial.

[31] Although he rejected the motorboating embellishment by Ms. Vieira, the trial judge found, based on the appellant's own evidence, that his face was in close

proximity to Ms. Vieira's breasts for two to three seconds, and concluded that he was invading her personal space, and that it was inappropriate conduct.

[32] The second discrepancy was with respect to whether the appellant had slapped Ms. Vieira on the buttocks or just touched her and whether it was deliberate or accidental.

[33] Ms. Vieira said it was a hard slap that stung for ten minutes afterward. The appellant said it was a light tap. His version was supported by other witnesses. The trial judge found that the slap was sufficient to cause Ms. Vieira to be shocked and upset. He concluded that a light tap would not have caused her to react the way she did.

[34] The trial judge also rejected the appellant's assertion that the contact was accidental, mainly for the reason that the appellant did not make that assertion until a few days later when termination of his employment was raised as a possibility.

[35] Third, the respondent took the position at trial that the slap amounted to a sexual assault, whereas the appellant asserted throughout that it was not sexual in nature. The trial judge made the following findings regarding the slap:

> I am of the view that the act of slapping Ms. Vieira on the buttocks in the presence of the other male workers is very serious and unacceptable conduct. Ms. Vieira testified that she felt humiliated by the action. She was upset and embarrassed. She was concerned that other male co-workers would treat her differently following the incident

> … Whether the act was a sexual harassment, sexual assault or simply a common assault, the purpose seems to be the same: to assert dominance over Ms. Vieira and to demean and embarrass her in front of her colleagues. I am satisfied that the act of slapping Ms. Vieira's buttocks was an act that attacked her dignity and self-respect. This type of conduct is unacceptable in today's workplace.

(2) The Relevant Factors Under the *McKinley* Analysis

[36] The trial judge considered and examined a number of the factual circumstances as part of the contextual analysis mandated by the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, at para. 48. He described his task at para. 12 of the reasons as follows:

> The contextual analysis requires an examination of the particular facts and circumstances and considers the nature and seriousness of the employee's conduct to determine whether it is sufficiently egregious so as to violate or undermine the employment relationship: [*McKinley*], at para. 57.

[37] After making the factual findings I have described, the trial judge next considered that the appellant was a supervisor, and in that capacity, was responsible for ensuring a safe work environment. He found that the appellant was in a position of authority over Ms. Vieira and that the nature of the employment relationship "is a factor which exacerbates the seriousness of the misconduct".

[38] The trial judge next considered that the respondent's Anti-Harassment and Anti-Discrimination Policy was a zero-tolerance policy that had been communicated to employees, including the appellant, just eight days before the

incident. The policy stated that sexual harassment could arise from a single incident and included unwelcome touching. The PowerPoint presentation on the policy that the appellant had seen days prior to the incident noted that sexual harassment may cause humiliation. The policy provided that the consequence would be discipline, up to and including termination of employment.

[39] The trial judge found that the appellant did not appreciate the seriousness of his action. Although he apologized, he did not believe that what he did amounted to sexual harassment. He confirmed at trial that he still held that belief. The trial judge commented that instead of taking responsibility for his actions, the appellant made a formal complaint to HR that Ms. Vieira had previously punched him in the shoulder. He also made a complaint regarding anti-Semitism. He concluded that the appellant's lack of contrition and failure to understand the seriousness of his actions "put[] into question whether the employment relationship could be maintained."

[40] The trial judge also considered mitigating factors. One was that the appellant had a record with no discipline or performance issues of any kind over a 30-year career with the respondent and its predecessor.

[41] However, the trial judge was not prepared to view the joking office culture, that included inappropriate personal "jokes" such as Ms. Vieira's comment about the appellant's height and the males slapping each other on the buttocks like

athletes on the field, as a mitigating factor. He referred to this court's decision in *Bannister v. General Motors of Canada Ltd.* (1998), 40 O.R. (3d) 577 (C.A.), at pp. 589-90, where Carthy J.A. stated:

> The trial judge, no doubt, formed the view, from listening to the witnesses, that this plant was a rough environment with abuse and sexual innuendo flowing freely in all directions, and the female employees strong enough to handle the exchanges. This is probably an apt description of many industrial environments of the past but cannot be tolerated in today's cultural acceptance of gender equality. It is not a question of the strength or mettle of female employees, or their willingness to do battle. No female should be called upon to defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented. It is an abuse of power for a supervisor to condone or participate in such conduct.

[42] In rejecting the office culture as a mitigating factor, the trial judge concluded:

> Although Ms. Vieira may have participated in the jokes, this does not mean she consented to being touched on a sexual part of her body. Also, she did not consent to being demeaned in front of her co-workers. Even in a joking environment there is a line that cannot be crossed, and that line includes physical touching without consent of a sexual and private part of someone's body. There is no place for any conduct which could result in a person feeling demeaned or disrespected.

(3) Application of the Circumstances to the Principle of Proportionality

[43] Having reviewed the circumstances and context of the impugned behaviour, the trial judge next turned to applying the law to the facts in order to determine

whether the termination of the appellant's employment was a proportionate response to the incident, applying the principle of proportionality mandated by *McKinley*, at para. 53. In that context, he acknowledged that the case law recognizes termination of employment as "the capital punishment" of employment law and quoted from *Carscallen v. FRI Corp.*, 2005 C.L.L.C. 210-038 (Ont. S.C.), at para. 72, aff'd 52 C.C.E.L. (3d) 161 (Ont. C.A.):

> The important factors emerging from these expressions of the principle of law include that the misconduct must be "serious"; that the misconduct must amount to "a repudiation of the contract"; that the acts "evince of intention to no longer be bound by the contract"; that dismissal is an "extreme measure"; and must not be resorted to in trifling cases. As previously observed, just cause is truly … the "capital punishment of employment law".

[44] The trial judge also noted that the onus of proof is on the employer to prove that "there was no other reasonable alternative to the termination of [the appellant's] employment for cause", and that the burden of proof to establish just cause is high, especially in the case of a long-serving employee.

[45] Applying all of these principles, the trial judge found that the respondent had met its onus and established that summary dismissal was the appropriate response in all the circumstances. He emphasized that it was the two aspects of the appellant's conduct, taken together – the slap on Ms. Vieira's buttocks and the lack of understanding and remorse – that were not reconcilable with sustaining the appellant's employment. The trial judge found it particularly concerning that the

appellant believed that a punch on his shoulder was equally serious as a male managerial employee slapping a female on the buttocks, and that the latter was not a form of sexual harassment or assault. In coming to his conclusion, the trial judge weighed the appellant's conduct against his previous good record, but was satisfied that the impugned conduct warranted summary dismissal.

(4) The Respondent's Litigation Conduct

[46] Although he dismissed the appellant's action on the merits, the trial judge devoted eight paragraphs at the end of his reasons to expressing his serious concerns about the litigation conduct of the respondent and Ms. Vieira. Rather than summarize, I set these paragraphs out in full:

> Although the action is dismissed, I wish to express my serious concerns with respect to the manner in which the defence was conducted.
>
> Ms. Vieira's testimony was clearly impeached with respect to whether she considered a civil action against [the appellant] to be a real possibility. She initially testified that she had never considered an action against [the appellant]. In cross-examination, she was shown her Affidavit sworn on November 28, 2017 in support of her motion for intervenor status. At paragraph 5, she deposed that although she had not brought a civil action against [the appellant], she is "considering it as a real possibility". After this was put to her in cross-examination, Ms. Vieira changed her trial testimony and admitted that she had considered an action against [the appellant].
>
> Ms. Vieira's conduct at the trial also deserves comment. Although she was subject to a witness exclusion order, she conducted an interview with the press after her examination-in-chief was completed and before her

> cross-examination. In addition, she exchanged text messages about her evidence with several people including Mr. Daniel, who had not yet given his evidence.
>
> I also wish to comment on the actions of the [respondent]. I recognize that [the respondent] is not responsible for what Ms. Vieira said to the press during the trial. I am of the view, however, that the [respondent] facilitated and promoted Ms. Vieira's breach of the witness exclusion order.
>
> The [respondent] retained Melanie Jameson Media Consultant on September 5, 2019. Before the trial started, she sent a statement about the case to 40 media outlets. The statement was sensationalist and read as follows:
>
> > This is important and I hope you'll share it with interested parties. …. its got sex, drama, termination, and a legal question that could potentially affect every work environment in Canada.
>
> The information sent to the media outlets included a statement from Ms. Vieira which included allegations which were not proven at trial.

[47] The trial judge then stated that the respondent's conduct would affect its entitlement to costs and asked for written submissions.

[48] In his costs endorsement, the trial judge reiterated his concerns about the respondent's unacceptable conduct in hiring a media consultant, who issued an inflammatory and sensationalist press release prior to trial that included allegations by Ms. Vieira that were not proven at trial and facilitated the breach of the witness exclusion order. He also found that the press release was unacceptable because

it may have been intended to put additional pressure on the appellant or to influence the court.

[49] In the result, the trial judge declined to award no costs, but reduced the amount he would have awarded by 50%. The final amount awarded against the appellant for costs was $73,696.66.

Issues

[50] The appellant submits that the trial judge erred by finding that there was just cause for dismissal based on findings of fact that were not supported by the evidence and on inconsistent credibility findings. He also submits that if the appeal is dismissed on the wrongful dismissal issue, the appellant should nevertheless be granted his *ESA* entitlements, punitive damages in the amount of $100,000, and the costs award of the trial should be set aside.

[51] I address each of these issues in turn.

Analysis

(1) Did the trial judge err by making findings of fact that were not supported by the evidence or that involved inconsistent credibility findings?

[52] The appellant submits that the trial judge erred by finding that touching Ms. Vieira's buttocks was not accidental, because it required him to accept the evidence of Ms. Vieira when he had rejected her credibility on other issues.

Second, he submits that the trial judge misapprehended the evidence by finding that the appellant was not remorseful when he had apologized a number of times.

[53] I would not give effect to these submissions for two major reasons: the deferential standard of review on findings of fact and credibility; and the detailed reasons of the trial judge for making his factual findings, including the two impugned findings.

[54] The standard of review requiring a palpable and overriding error or misapprehension of the evidence is trite law. The appellant has not identified a palpable and overriding error. Instead, his submission amounts to an argument that the trial judge should have accepted certain evidence and rejected other evidence, an argument that does not allow appellate intervention: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 23.

[55] The trial judge specifically rejected the appellant's evidence that his contact with Ms. Vieira's buttocks was accidental. He gave a number of reasons for rejecting this evidence. First, he rejected the appellant's initial denial at trial that he was not annoyed at her comment about his height, and did so based on the appellant's own contradictory discovery evidence. Second, the fact that the appellant said "good game" was consistent with what the male employees said to each other after they would slap one another on the buttocks. Third, although Ms. Vieira was clearly upset right away, the appellant did not say it was an

accident. He only said that several days later. This was corroborated by other witnesses to the incident. Fourth, the trial judge found that the appellant could have stopped himself when he saw Ms. Vieira turning as he was moving his arm toward her but before he made contact.

[56] To the extent that the third point involved an assessment of the credibility of the appellant and Ms. Vieira, the trial judge was entitled to accept Ms. Vieira's evidence that the appellant did not say to her that it was an accident. His other findings show the basis for his conclusion, which is entitled to deference.

[57] Similarly, on the issue of remorse, the trial judge was aware that the appellant had apologized several times. However, the trial judge was concerned that the appellant did not believe that touching Ms. Vieira's buttocks amounted to sexual harassment, and that the appellant would not acknowledge the seriousness of what had occurred in a workplace context. These concerns were evidenced by the appellant's comment afterward to his two co-workers in his office about charging $10 to touch his hand, and his testimony at trial. Again, as the trier of fact, it is for the trial judge to hear and see the evidence and draw conclusions from it.

(2) Did the trial judge err in law by finding that there was just cause for termination of the appellant's employment?

[58] The appellant argues that the evidence shows there was no breakdown in the employment relationship and that there were other disciplinary measures

available that would have adequately addressed the situation but which the respondent failed to consider before terminating the appellant's employment.

[59] Again, the standard of review plays an important role in considering this argument. The appellant does not say that the trial judge did not apply the correct legal test or case law. In effect, he is submitting that the trial judge failed to give sufficient weight to certain evidence in his analysis.

[60] As the trial judge stated, the Supreme Court has held that the governing rule in termination for cause cases is proportionality: *McKinley*, at para. 53. Because the employment relationship is such a fundamental one in Canadian society, an employee's job can only be terminated for cause if that is a proportionate response to the misconduct. An employer in a non-unionized workplace may always terminate the employment of any employee on reasonable notice. Termination for cause is without notice and without paying salary in lieu of notice. It is reserved for circumstances where the employment relationship cannot be sustained: *McKinley*, at para. 48.

[61] This court recently reaffirmed in *Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728, 74 C.C.E.L. (4th) 196, the three-step test set out in *Dowling v. Ontario (Workplace Safety & Insurance Board)* (2004), 246 D.L.R. (4th) 65 (Ont. C.A.), at paras. 49-50, for applying the *McKinley* standard:

> Following *McKinley*, it can be seen that the core question for determination is whether an employee has engaged

> in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the misconduct.
>
> Application of the standard consists of:
>
> 1. determining the nature and extent of the misconduct;
>
> 2. considering the surrounding circumstances; and
>
> 3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).

[62] Although the trial judge did not refer to *Dowling*, he applied the three-part test in his analysis of the evidence and in his conclusion.

[63] The appellant submits that the trial judge failed to consider that the appellant remained on the job until his employment was terminated, even attending a client lunch with the vice-president of the company, and that this shows that the employment relationship remained intact after the incident. He also submits that there were other disciplinary measures that could have been imposed such as a suspension, a final warning, or a transfer to another office, and that the respondent failed to consider any of those. Finally, he argues that the respondent treated other employees more leniently.

[64] The appellant is correct that the onus was on the respondent to prove that there were no other disciplinary measures that it could reasonably have taken and

that dismissal was proportionate in all the circumstances. However, I do not agree that the respondent had a standalone duty to consider alternative measures, provided that in the result, the disciplinary measure that was ultimately imposed was proportionate.

[65] The core question on a case of just cause dismissal is "whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship": *Dowling*, at para. 49. In order to meet its onus on this question, the respondent does not have to prove that it went through the process of applying the three-part test prior to terminating the employee, although that would certainly be the best practice in order to satisfy its onus in court. The Manitoba Court of Appeal reached a similar conclusion regarding whether an employer has a procedural duty to investigate allegations of theft before terminating an employee's employment on that basis in *McCallum v. Saputo*, 2021 MBCA 62. As Pfuetzner J.A. said in that case at para. 22, where courts have commented on this duty, "it is in a practical, cautionary sense rather than as a free-standing legal duty." If the court ultimately finds that there were reasonable alternatives to termination, summary dismissal will not have been justified, and the employer will be liable for wrongful termination. However, the fact that the employer did not specifically turn its mind to this question is not a free-standing error that turns an otherwise proportionate summary dismissal into a disproportionate one.

[66] In any event, there was evidence that the respondent in this case did consider the availability of other disciplinary measures, but decided that they could not be implemented because to retain the appellant would send a message to other female employees that the impugned conduct was being condoned. Given the seriousness of the conduct, involving non-consensual touching of a private part of the body, the respondent determined that it could not condone it or be seen to condone it.

[67] The trial judge agreed. He referred to the respondent's Anti-Harassment and Anti-Discrimination Policy, which had just been implemented, plus the fact that the appellant was a manager and was responsible for implementing the policy, the sexual nature of the contact, and the appellant's lack of appreciation of its seriousness in the workplace context. He weighed all the other circumstances, including the appellant's long and unblemished history with the company, but concluded that the respondent was entitled to terminate the appellant's employment for cause.

[68] With respect to the appellant's argument that the respondent has treated other employees more leniently in the past, it must be remembered that each case is to be examined on its own particular facts and circumstances: *McKinley*, at para. 57. For example, the appellant's position as a manager who supervised other employees and implemented the respondent's policies puts him in a different position from non-managerial employees. While the employer's policies and

practices are a relevant factor under the three-part test set out in *Dowling*, the treatment of other employees must not overwhelm the analysis and cannot be determinative. Each case turns on its facts.

[69] I see no error in the trial judge's approach or analysis. He considered and weighed all of the relevant factors. His conclusion is entitled to deference.

[70] I would also add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand. As this court said in *Bannister* almost 25 years ago, it is a workplace atmosphere that can no longer be tolerated. Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed.[1]

[1] In this case, there were also allegations of anti-Semitic comments. While those allegations are not before this court, nothing in these reasons should be taken to condone such comments. To be clear, anti-Semitic comments cannot be tolerated in a workplace.

(3) Did the trial judge err by failing to award the appellant his entitlements under the *ESA*?

[71] The appellant submits that he should have been awarded his statutory *ESA* entitlements and that the trial judge erred by failing to do so.

[72] Under the *ESA*, employees who have been employed for eight years or more are entitled to eight weeks of termination pay, unless they are disentitled to such pay under the statute:

> **55** Prescribed employees are not entitled to notice of termination or termination pay under this Part.
>
> **57** The notice of termination under s. 54 shall be given,
>
> …
>
> (h) at least eight weeks before the termination, if the employee's period of employment is eight years or more.
>
> **61** (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,
>
> (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and
>
> (b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

[73] The *ESA* also provides for severance pay under the following provisions:

> **64** (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and …
>
> (b) the employer has a payroll of $2.5 million or more.
>
> (3) Prescribed employees are not entitled to severance pay under this section.
>
> **65** (1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,
>
> (a) the number of years of employment the employee has completed; and
>
> (b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12.
>
> (5) An employee's severance pay entitlement under this section shall not exceed an amount equal to the employee's regular wages for a regular work week for 26 weeks.

[74] However, as stated in ss. 55 and 64(3) of the *ESA*, certain prescribed employees are disentitled to termination and severance pay. The disentitlement provisions are found in the *Termination and Severance of Employment*, O. Reg. 288/01 (the "Regulation"), a regulation to the *ESA*, which provides in relevant part:

> **2.** (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:
>
> …
>
> 3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

> **9.** (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:
>
> …
>
> 6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

[75] The respondent says that the appellant did not ask for these benefits either in his pleadings or at trial, and therefore cannot ask for them now. It also argues that having been dismissed for cause, he is not entitled to any benefits in accordance with ss. 2(1)3 and 9(1)6 of the Regulation.

[76] The respondent is correct that the appellant's pleadings do not contain a reference to the *ESA* or the Regulation, nor did counsel make any submission about it in his closing. However, counsel for the appellant did refer to the *ESA* in his opening statement at trial in the following passage:

> Why this employer entirely and utterly rushed to judgment, summarily terminated the employee without any offer of compensation, even compensation under the minimums of the *Employment Standards Act*, suggesting that the act, the incident that we're talking about, was both serious in nature, in compliance with their own policies and procedures and wilful.

[77] The evidentiary basis for the *ESA* entitlement claim was also established at trial, where the appellant testified that he received no compensation or severance when his employment was terminated.

[78] In my view, the appellant is entitled to receive his proved statutory benefits unless that entitlement is precluded by the wording of ss. 2(1)3 and 9(1)6. *ESA* entitlements are statutory and disentitlement cannot be achieved by agreement, unless to provide for a greater benefit to the employee: *ESA*, s. 5(1). In this case, the issue was raised, at least indirectly, at the trial. I acknowledge that the better approach would have been to raise the entitlement issue directly so that the trial judge could decide at first instance whether the impugned conduct fell within the statutory disentitlement sections. However, in the circumstances of this case, where non-compliance with the statute was raised in the opening statement and the relevant evidence is in the record, I would not prevent the appellant from asserting the claim on appeal.

[79] The law on the interpretation of the prohibition sections has been consistently stated to require more than what is required for just cause for dismissal at common law. In *Plester v. Polyone Canada Inc.*, 2011 ONSC 6068, 2012 C.L.L.C. 210-022, aff'd 2013 ONCA 47, 2013 C.L.L.C. 210-015 (the reasons on appeal found it unnecessary to address this point), Wein J. explained that in order to be disentitled from the *ESA* entitlements under the "wilful misconduct" standard in the Regulation, the employee must do something deliberately, knowing they are doing something wrong. In the case before Wein J., the conduct was not preplanned and not "wilful" in the sense required under the test, which she described as follows at paras. 55-57:

The test is higher than the test for "just cause".

> "In addition to providing that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from 'just cause', that the conduct complained of is 'wilful'. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose".

Both counsel seemed to be slightly bemused by the recent authorities that distinguish between the definition of just cause and wilful misconduct. In my view, however, the distinction is quite obvious: Just cause involves a more objective test, albeit one that takes into account a contextual analysis and therefore has subjective elements. Wilful misconduct involves an assessment of subjective intent, almost akin to a special intent in criminal law. It will be found in a narrower cadre of cases: cases of wilful misconduct will almost inevitably meet the test for just cause but the reverse is not the case.

The conduct of Mr. Plester was serious, and his failure to report deliberate. However, it did not rise to the very high test set for disentitlement to the statutory notice benefit. It was not preplanned and not wilful in the sense required under this test. There was an element of spontaneity in the act itself and at most a "deer in the headlights" freezing of intellect in the delay in reporting. On these facts willful misconduct should not be found. [Emphasis added.]

[80] The differing standards at common law and under the *ESA* are further discussed in a number of cases, as well as in the Ministry of Labour's *Employment*

Standards Act Policy and Interpretation Manual (2020). The Manual states: “this exemption is narrower than the just cause concept applied in the common law and in collective agreement disputes. In other words, an arbitrator or a judge may find that there was just cause to dismiss an employee, but this does not necessarily mean that the exemption in paragraph 3 of s. 2(1) applies.” This principle has also been followed in a number of other authorities: see, e.g., *Lamontagne v. J.L. Richards & Associates Limited*, 2021 ONSC 8049, 75 C.C.E.L. (4th) 86, at paras. 16, 19, leave to appeal to Ont. C.A. requested, M53078; *Cummings v. Quantum Automotive Group Inc.*, 2017 ONSC 1785, at para. 73; *Ojo v. Crystal Claire Cosmetics Inc.*, 2021 ONSC 1428, 60 C.C.P.B. (2nd) 200, at para. 14; and *Khashaba v. Procom Consultants Group Ltd.*, 2018 ONSC 7617, 52 C.C.E.L. (4th) 89, at para. 53.

[81] In my view, the appellant’s conduct does not rise to the level of wilful misconduct required under the Regulation. While the trial judge found that the touching was not accidental, he made no finding that the conduct was preplanned. Indeed, his findings with respect to the circumstances of the touching are consistent with the fact that the appellant’s conduct was done in the heat of the moment in reaction to a slight. Although his conduct warranted dismissal for cause, it was not the type of conduct in the circumstances in which it occurred that was intended by the legislature to deprive an employee of his statutory benefits.

[82] The appellant proved his entitlement to eight weeks of termination pay. However, as we were not directed to anywhere in the record of evidence that the respondent has a $2.5 million payroll, as required under s. 64(1)(b), the court is not in a position to award the requested 26 weeks of severance pay.

(4) Did the trial judge err by failing to award punitive damages for litigation misconduct?

(5) Did the trial judge err in his award of costs?

[83] As these issues are linked, I propose to deal with them together.

[84] The appellant asked the trial judge to award punitive damages against the respondent for trial misconduct. The misconduct arose as a result of the finding that the respondent retained a trial publicist who facilitated the breach of the witness exclusion order, thereby tainting the evidence of a number of witnesses, and whose “inflammatory and sensationalist” press release contained unproved allegations and was intended to possibly pressure the appellant and influence the trial judge. The trial judge made a specific finding that the respondent was responsible for the actions of the media consultant. He rejected the respondent’s submission that hiring a media consultant facilitated the open courts principle. He stated: “I do not accept that the principle extends so far as to justify the preparation and wide distribution of an inflammatory and sensationalist press release on the

eve of trial. In this case, the press release was not a balanced communication designed to educate the press with respect to the issues in the action."

[85] The trial judge declined to order punitive damages, electing to address the issue in the costs award. After making the findings of misconduct, he declined to order no costs, but treated the misconduct as a factor in determining the amount of costs. In the result, he reduced the respondent's costs entitlement by 50%, and awarded $73,696.66 in costs payable by the appellant.

(1) Punitive Damages

[86] In *McCabe v. Roman Catholic Episcopal Corp.*, 2019 ONCA 213, 146 O.R. (3d) 607, this court confirmed that litigation misconduct can be an independent actionable wrong that can give rise to an award of punitive damages: at para. 48. The trial judge declined to deal with the issue in that way, and instead determined that the respondent's litigation misconduct could be addressed in the context of entitlement to costs. He was entitled to take that approach and his decision on this point is entitled to deference. As this court affirmed in *McCabe*, punitive damages remain "the exception rather than the norm": at para. 48.

(2) Costs of the Trial

[87] In deciding to award the respondent its costs, one factor the trial judge took into account was that the respondent was fully successful in the action. However, that was because the court did not deal with the *ESA* entitlement. Although I would

dismiss the appeal on the main ground, the appellant has now been awarded eight weeks' termination pay, and as a result, the respondent is not fully successful. Leave to appeal from the costs order is therefore not necessary: *Tadayon v. Mohtashami*, 2015 ONCA 777, 341 O.A.C. 153, at para. 70; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(b).

[88] I add, however, that I would have granted leave to appeal the costs award in any event. In my view, there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion": *Brad-Jay Investments Ltd. v. Szijjarto* (2006), 218 O.A.C. 315, at para. 21 (C.A.), leave to appeal refused, [2007] S.C.C.A. No. 92; *Hobbs v. Hobbs*, 2008 ONCA 598, 240 O.A.C. 202, at para. 32; *Pinder Estate v. Farmers Mutual Insurance Company (Lindsay)*, 2020 ONCA 413, 3 C.C.L.I. (6th) 8, at para. 128.

[89] I would allow the appeal with respect to the costs awarded below. In my view, the litigation misconduct by the respondent disentitled the respondent to its costs of the trial. In *Georg v. Hassanali* (1989), 18 R.F.L. (3d) 225 (Ont. S.C.), one party delivered a news release during the trial. The court found that the purpose was to improperly apply pressure on the opposite party. The trial judge quoted the following from Houlden J.A. in *Andrews v. Andrews* (1980), 32 O.R. (2d) 29 (C.A.): "'[t]he conduct of the parties during the litigation' is a most important factor to be taken into account by a judge in the exercise of 'his discretion as to costs'". The

court in *Georg* declined to order any costs on the basis that the conduct could not be condoned or tolerated.

[90] That result applies in this case. The litigation misconduct at this trial was particularly egregious, as described by the trial judge. It interfered with trial fairness by tainting the evidence of witnesses and may have been intended to influence the court and pressure the appellant. Such conduct undermines the fairness and integrity of the judicial system. It cannot be tolerated or condoned.

[91] In my view, the trial misconduct disentitled the respondent to its costs of the trial.

Conclusion

[92] I would dismiss the appeal regarding the dismissal for cause and the refusal to award punitive damages; I would allow the appeal regarding the appellant's entitlement to eight weeks' statutory termination pay; and I would allow the appeal of the award of costs, set aside the award, and order no costs of the trial. As there was divided success on the appeal, I would not order costs of the appeal to either side.

Released: April 20, 2022 "K.F."

"K. Feldman J.A."
"I agree. S.E. Pepall J.A."
"I agree. M. Tulloch J.A."