Citation: Altman v. Steve's Music, 2011 ONSC 1480
Court File No.: CV-10-398619
Date: March 8, 2011

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Shelley A. Altman

Plaintiff

- and -

Steve's Music Store Inc., also carrying on business as Steve's Music,
Steve's Music Store and Steve's Digital

Defendant

COUNSEL: Mr. Albert S. Frank for the Plaintiff
Mr. Earl Altman for the Defendant

HEARING DATES: January 31, February 1, 3, 4, 7, 2011

REASONS FOR DECISION

Corrick J.

Introduction

[1] Shelley Altman is a 59-year-old woman who worked for Steve's Music Store for slightly more than 30 years. In December 2007 Ms. Altman was diagnosed with stage IIIa non-small cell lung cancer. On April 7, 2009 Steve's Music terminated Ms. Altman's employment.

[2] This is an action for wrongful dismissal. Ms. Altman seeks damages under the following heads: pay in lieu of notice, moral damages for mental distress, and punitive damages. She also seeks payment of salary and benefits earned before her termination remaining unpaid, including wages, vacation pay, commissions, bonuses and deferred profit sharing plan entitlements.

[3] Steve's submits that Ms. Altman's employment contract was frustrated as she was unable to work due to her illness, and therefore there has been no wrongful dismissal. Steve's also submits that Ms. Altman has received all pay and compensation earned to the date that her job ended.

[4] There are five issues to decide:

1. Does Steve's owe Ms. Altman any outstanding compensation for severance, wages, vacation, commission, bonus and deferred profit sharing plan?

2. Was Ms. Altman's employment contract frustrated?

3. If Ms. Altman's employment contract was not frustrated, what is the appropriate period of notice?

4. Are moral damages for mental distress appropriate, and if so, what is the quantum?

5. Are punitive damages appropriate, and if so, what is the quantum?

[5] I address each of these issues in sequence.

[6] For the reasons that follow, I find that Ms. Altman's employment contract was not frustrated and that she was wrongfully dismissed. She is entitled to 22 months salary in lieu of notice, $35,000.00 in damages for mental distress and $20,000 in punitive damages.

Procedural History

[7] Ms. Altman moved for summary judgment on the issue of her entitlement to statutory termination and severance pay, and payment of amounts held for her in a deferred profit sharing plan. On December 29, 2010 Conway J. ordered Steve's to pay Ms. Altman the statutory minimum of eight weeks termination pay, plus pre-judgment interest by no later than January 7, 2011. Conway J. also ordered Steve's to pay Ms. Altman the amount held for her in the deferred profit sharing plan and provide Ms. Altman with an accounting. Conway J. ordered the action to proceed directly to trial, including the issue of statutory severance pay.

[8] On January 11, 2011 Steve's paid Ms. Altman $11,230 in satisfaction of the termination pay required by the *Employment Standards Act*, S.O. 2000, c.41 ["the Act"]. Ms. Altman has also received two cheques totalling $46,551.06 representing the proceeds from the deferred profit sharing plan. Steve's has not provided the accounting to Ms. Altman as ordered by Justice Conway.

Facts

[9] Ms. Altman began working for Steve's in 1978 and worked there continuously until she was terminated in 2009. Steve's is a family-run business owned by Steven Kirman. His son, Michael Kirman, is the vice-president of the company. Its head office is in Montreal. It has retail stores in Toronto, Ottawa, and Montreal, and employs more than 200 people.

[10] Ms. Altman began at Steve's in Toronto doing unpaid work. Her husband at the time was the assistant manager of the store and Ms. Altman was helping on the floor because there was not enough sales staff. She began her paid employment with Steve's working at the front counter. She advanced within the company to being responsible for the daily accounting to becoming

office manager, and in 1998, becoming store manager. When Steve's terminated her, she was a store manager.

[11] Ms. Altman's employment at Steve's was very important to her. She considered the Kirman family part of her family, and worked at Steve's as if she were part of the Kirman family. She was personally acquainted with the members of the Kirman family. She attended the wedding of Steve Kirman's daughter.

[12] Ms. Altman was a loyal and dedicated employee. As counsel for Steve's admitted, she was a valued employee for 30 years. She did not simply clock in and clock out at work. On her days off, she worked at home and stayed in touch with the store. She represented Steve's on an advisory board of the Music Industries Association of Canada. She was particularly proud of being the only female non-related manager of a major music store in Canada. She was well known throughout the Canadian music industry.

[13] In December 2007 Ms. Altman was diagnosed with stage IIIa non-small cell lung cancer. She underwent surgery in February 2008, in which part of her lung was removed. In April 2008 she underwent chemotherapy, followed by six and a half weeks of radiotherapy. Her treatment was completed on September 17, 2008. Following her surgery in February 2008 Ms. Altman was off work for one month. Between March and October 18, 2008 Ms. Altman worked reduced hours. She worked as much as she could, given the amount of time she had to take off to have her cancer treatments and the physical effects of the treatment. It was important to her to continue working as she felt it was her duty and it helped her maintain some degree of normalcy throughout her treatment.

[14] Steve's was aware of Ms. Altman's illness, the treatment she was having, and the reduced hours she was working. Steve's was supportive of her and was paying Ms. Altman her regular salary. No one at Steve's told Ms. Altman that she was being remiss in her duties or that her absences were putting her job at risk.

[15] On October 15, 2008, Ms. Altman received a letter by bailiff from Kaufman Laramée LLP, a law firm representing Steve's, which read as follows:

> We are the attorneys representing the interests of your employer Steve's Music and as such, we have as instructions to serve you with the present letter. According to the information provided by our client, it appears that you have been remiss in your duties and obligations towards Steve's Music in failing to work minimum number of hours required by your employer from Monday to Friday. You have taken it upon yourself to come in late and leave early or for that matter not attend for days on end, without providing your employer with prior notice or written justification for your absenteeism.
>
> In view of the foregoing, we have as instructions to advise you that unless you fulfill your obligations towards your employer in full by working regular working day [sic] as stipulated by your employer's directives, Steve's Music will have no alternative but to advise you that your employment will be terminated, without further notice or delay.

[16] The letter shocked Ms. Altman. She had no reason to expect it, and she was devastated by it. She went to work the next day, October 16, 2008, because she feared she would be terminated if she did not. That was the last day she worked at Steve's. She began a three-month medical leave of absence on October 17, 2008. That medical leave was extended for a further three months on January 9, 2009.

[17] On April 1, 2009 Ms. Altman faxed Steve's head office indicating she was returning to work on April 8, 2009. She sent another fax on April 6, 2009 indicating that she had to delay her return to work until April 20, 2009 because she had fractured her back and her doctor had suggested she take two further weeks off work.

[18] On April 7, 2009 Kaufman Laramée sent Ms. Altman a letter by bailiff terminating her employment. Parts of the letter read as follows:

> We have as instructions from our client to advise you that in light of our correspondence addressed to both you and your attorney since October 2008 to date, as well as your application for long term disability and the fact that your position with Steve's Music, has since been abolished, Steve's Music has no obligation to re-instate you.
>
> …. Steve's Music was fully entitled to offset and deduct from your remuneration or for that matter any other sums due and owing to you, for your absenteeism, late arrivals and early departures.

[19] Steve's Music paid Ms. Altman nothing upon termination.

Relief Sought

[20] In her statement of claim, Ms. Altman claims the following:

a. damages in the amount of $450,000;
b. payment of the amount that should be in her vacation bank;
c. payment of earned but unpaid amounts of commission on store sales;
d. payment of unpaid salary;
e. damages for the loss of her insurance plan, which includes her medical, dental, disability and life insurance benefits and more, or in the alternative an order that Steve's take the necessary steps to ensure that her plan continues in full force and effect until she is 65 years of age;
f. punitive, aggravated and exemplary damages in the amount of $250,000;
g. pre and postjudgment interest; and
h. costs of the action and pre-litigation steps on a substantial indemnity scale.

[21] At trial, Ms. Altman also claimed monies held for her in Steve's deferred profit sharing plan, and severance pay pursuant to section 64 of the Act. While these claims were not formally pleaded in the statement of claim, both counsel presented evidence and made submissions at trial

as if they were part of the plaintiff's claim. I have treated them as such. If sought, I would have granted an amendment to the claim, as there was no prejudice.

[22] No evidence was presented regarding e. above, the loss of insurance benefits, and that claim is therefore dismissed.

Findings of Credibility

[23] Many of the facts of this case are not in dispute. Where witnesses differed, it was usually a matter of degree. Three witnesses testified about the circumstances of Ms. Altman's employment and remuneration – Ms. Altman, Michael Kirman and Wallace McKeaveney. I wish to address, in a general way, my findings of the credibility and reliability of each of them.

[24] Ms. Altman was a credible witness. She described events in a matter-of-fact manner without embellishment. Her memory of events was clear and she indicated when she could not remember or did not know the precise answer to a question, even when that was to her detriment.

[25] She was not vindictive in her testimony. She offered information about circumstances that could explain some of Steve's conduct. For example, she testified that the difficulties she experienced with her pay cheques in August 2008 were due to the fact that the transfer of responsibility for the payroll system to Montreal had not gone perfectly smoothly. In Ms. Altman's words, "that was understandable."

[26] She made efforts to obtain information, which is in stark contrast to the efforts made by Michael Kirman and Wallace McKeaveney. For example, the second page of the April 7, 2009 letter to Ms. Altman terminating her employment was missing from Tab 70 of Exhibit #2. Ms. Altman searched for it and submitted it to the court.

[27] Ms. Altman's evidence was coherent and accords with common sense.

[28] Mr. Kirman's knowledge and memory of events was lacking. He has worked for Steve's for 20 years and has been vice-president for five years. He is responsible for reviewing and overseeing the general operations of the store, including the store managers. He testified that he knew nothing about Ms. Altman's vacation account, or her salary. In his words, "he doesn't pry into the salaries or vacation accounts of employees." He had nothing to do with the decision to deduct Ms. Altman's vacation account, or to terminate her employment. He testified that he first saw many of the documents relevant to this dispute at his examination for discovery in January 2011.

[29] Despite the fact that he was the company's representative in this litigation, he made no effort to inform himself about the matters in dispute such as Ms. Altman's vacation account, unpaid salary, or deferred profit sharing plan. On the other hand, he was well informed about matters that assisted his position. For example, whether Steve's was obliged to pay Ms. Altman severance pay was an issue in the trial. The obligation depended on whether the amount of Steve's payroll exceeded $2.5 million. If Steve's payroll in Quebec was included in the total, the payroll exceeded $2.5 million; otherwise it did not. When asked what Steve's total payroll was, including Quebec, Mr. Kirman responded that he had no clue. When asked what the Ontario payroll was, he said $2 million. He testified that he reviewed the amount of the Ontario payroll

because he knew it was an issue in the trial. When I dismissed his counsel's objection that the question was irrelevant, he acknowledged that the total was more than $2.5 million. I conclude that Mr. Kirman was either untruthful about his knowledge of the total payroll when he said he had no clue, or that he deliberately failed to inform himself. In either event, I find that his evidence lacks credibility.

[30] Mr. McKeaveney has been the controller of Steve's Music since April 1999. He is responsible for the day-to-day accounting operations of Steve's, including the administration of payroll, and the supervision of the accounting staff. Mr. McKeaveney's evidence was vague. His memory was faulty about the timing of the instructions he received to withdraw money from Ms. Altman's vacation account. Despite his responsibilities at Steve's, Mr. McKeaveney was unable to provide the court with information about Ms. Altman's salary or her contributions to the deferred profit sharing plan. He acknowledged, for example, that Ms. Altman had not been paid for nine hours and fourteen minutes that she had worked between September 21 and 25, but was unable to tell the court how much she should have been paid. What he was able to tell the court was that Steve's did not owe Ms. Altman any money. He testified that he did not know how the deferred profit sharing plan worked. I do not find Mr. McKeaveney to have been a reliable witness.

[31] I am entitled to accept none, some or all of a witness's testimony. Where the testimony of Ms. Altman varies from the testimony of Mr. Kirman and Mr. McKeaveney, I prefer the testimony of Ms. Altman. I adopt the words of O'Halloran J. of the British Columbia Court of Appeal in *Faryna v. Chorny*:[1]

> [10] […] the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Severance Pay

[32] Entitlement to severance pay is governed by section 64 of the Act, which provides as follows:

> 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.

[33] Steve's Music has operations in Ontario and Quebec. The issue before me is whether the payroll of Steve's employees in Quebec should be included in the determination of the payroll under s. 64(1)(b). The evidence is that the Ontario payroll is $2.1 million. If the Quebec payroll is included, the total exceeds $2.5 million.

[34] In the case of *Northern Superior Supply Co.*,[2] the Ontario Labour Relations Board held that only the payroll of an employer's operation in Ontario is relevant to s. 64(1)(b). The Board

held that Ontario has legislative authority with respect to businesses operating in Ontario and has no authority to legislate concerning payrolls in other provinces.

[35] The Board relied on the decision of the Divisional Court in *Tullett and Tokyo Forex (Canada) Ltd. v. Singer*[3] in which the court held that an employee of a Canadian subsidiary of a U.S. company who had worked four years for the U.S. company, and two years in Ontario for the Canadian subsidiary, was not entitled to severance pay because he had not worked in Ontario for more than five years. The court held that the provision in the Act was directed to Ontario based employment. Similar rulings have been made in other cases.[4]

[36] Ms. Altman is not entitled to severance pay given that Steve's payroll for its Ontario operations is less than $2.5 million. This claim is therefore dismissed.

Unpaid Commission

[37] Steve's has agreed to pay Ms. Altman $4,725.00 in commission.

Deferred Profit Sharing Plan

[38] Wallace McKeaveney, the controller of Steve's Music, testified that once a year Steve Kirman, the president of Steve's, contributed money into an account on behalf of certain employees. Money was contributed on behalf of Ms. Altman. The amount contributed was in the sole discretion of Steve Kirman. He based it on the company's annual earnings. Ms. Altman did not receive regular statements regarding this account, and was not aware of how much money was in it. Statements related to the account contained in Tabs D1 and D2 of Exhibit #2 show that the account was managed by a third party, and that the quarterly statements were addressed to Ms. Altman at Steve's head office in Montreal.

[39] On December 29, 2010, the parties appeared before Conway J. at which time Steve's agreed to pay Ms. Altman the amount held on her behalf in the deferred profit sharing plan. Conway J. ordered that the payment be accompanied by an accounting. Ms. Altman has received two cheques totalling $46,551.06 from the account. She has not received an accounting. The parties consent to have the issue of the amount owed to Ms. Altman from the deferred profit sharing plan determined at a reference before a master pursuant to rule 54.02(1)(a) of the *Rules of Civil Procedure*.[5]

Salary

[40] Ms. Altman testified that she has not received salary for days that she worked. Specifically, she testified that she was not paid for time she worked during the week of October 13, 2008. When the payroll function was transferred to Montreal in August 2008, she testified that her paycheques were not accurate for a time. Ms. Altman testified that she never received paycheque #28444. Finally, Ms. Altman was entitled to bonus payments each year. These payments were deposited directly into her bank account, but she did not receive a bonus payment for 2006 or 2007.

[41] Mr. McKeaveney testified that, as a result of an oversight, Ms. Altman was not paid for nine hours that she worked between September 21 and 29, 2008. A document Mr. McKeaveney

prepared for the trial setting out the number of hours Ms. Altman worked compared to the number of hours for which she was paid indicates that Ms. Altman received no salary after September 20, 2008.

[42] Steve's submits that it does not owe Ms. Altman any salary because she was paid her full salary from January 12 to September 20, 2008 despite her absences from work.

[43] The circumstances under which an employer can withhold salary from an employee are limited. They are set out in s. 13 of the Act, which provides as follows:

> 13. (1) An employer shall not withhold wages payable to an employee, make a deduction from an employee's wages or cause the employee to return his or her wages to the employer unless authorized to do so under this section.
>
> (2) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them if a statute of Ontario or Canada or a court order authorizes it.
>
> (3) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them with the employee's written authorization.

[44] The circumstances in this case do not fall within s. 13, and Steve's is not entitled to withhold Ms. Altman's salary because they concluded they had overpaid her for services performed. The alleged overpayment was not the result of an administrative error, but was the result of a decision taken by the president of the company to pay Ms. Altman her salary while she was receiving treatment for cancer.

[45] In the case of *Lavinskas v. Jacques Whitford & Associates Ltd.*[6] the court dealt with a similar situation. Whitford clawed back from Lavinskas' last pay disability benefits that had been paid to him because Whitford did not agree that the medical evidence produced by Lavinskas supported his disability claim. Aitken J. commented as follows:

> [117] […] Under s. 13(1) of the Employment Standards Act, 2000, S.O. 2000, c. 41, an employer shall not withhold wages payable to an employee, make a deduction from an employee's wages or cause the employee to return his or her wages to the employer unless authorized to do so under that section. There are no provisions in s. 13 that authorized Jacques Whitford to claw back the disability payments from Mr. Lavinskas' last paycheque. That Jacques Whitford had been in error to do so was acknowledged by its counsel at the end of the trial. Counsel subsequently notified the court that Mr. Lavinskas had been repaid the amount of that clawback. This issue is now a moot point, though it does exemplify the harsh nature in which Jacques Whitford treated Mr. Lavinskas at the time of his dismissal.[7]

[46] I find that Steve's has not paid Ms. Altman all of the wages to which she is entitled nor has it made all of the bonus payments to which Ms. Altman is entitled. No precise amounts of unpaid salary or bonus were presented in the evidence before me. I direct that the amount of unpaid salary for 2008 and the amount of unpaid bonus payments for 2006 and 2007 be

determined at a reference to a master pursuant to rule 54.02(1)(c) of the *Rules of Civil Procedure.*

Vacation Pay

[47] Beginning in 1998, Ms. Altman was entitled to 6% of her gross pay as vacation pay. Mr. McKeaveney testified that employees were entitled to different amounts of vacation pay depending on the individual employee's agreement with Steve Kirman. For every pay period, 6% of Ms. Altman's gross earnings were put into a vacation account. If Ms. Altman did not take vacation in any given year, the money in the vacation account would be accrued. The amount deposited into the vacation account was not indicated on Ms. Altman's pay cheque. Mr. McKeaveney testified that employees were required to call Steve's head office to determine their vacation entitlement.

[48] Ms. Altman testified that she rarely took vacation time and had thus accrued a great deal of money in her vacation account. She was not aware of the precise amount, although she calculated it to be about $37,504.90.

[49] Mr. McKeaveney testified that there was no outstanding balance in Ms. Altman's vacation account when she was terminated on April 7, 2009. On the instruction of Steve Kirman, Mr. McKeaveney transferred out the balance in Ms. Altman's vacation account to offset the difference between the time Ms. Altman worked and the time for which she was paid. Ms. Altman was not informed of this. Mr. McKeaveney testified that he did not tell her. Michael Kirman testified that he did not tell her.

[50] Steve's had no formal written sick leave policy. Although Mr. McKeaveney testified that the employees of Steve's were not entitled to sick days, he also testified that employees took sick days at the discretion of their manager. In Ms. Altman's case, Steve Kirman, the president, decided that Ms. Altman would receive her full salary despite her absences due to cancer. As a result, she received her full salary every two weeks between January and September 2008. I find that the informal sick leave policy applied in Ms. Altman's case was that she was paid for her sick days. There was no policy, written or otherwise, formal or informal, that an employee's vacation pay would be deducted for sick days.

[51] Mr. McKeaveney testified that he was told by Steve Kirman to pay Ms. Altman her full salary but deduct whatever he could from her vacation account. Mr. McKeaveney could not recall when Steve instructed him to do this. He prepared a document[8] showing the number of hours Ms. Altman worked between December 30, 2007 and October 4, 2008, and the number of hours for which she was paid. When he was asked what the company did with the information, he replied, "I had to figure out how much to take out of her [Ms. Altman's] vacation bank for absent time."

[52] I find that when Ms. Altman became ill, Steve Kirman decided that she would continue to receive her full salary, but changed his mind in October 2008, and directed Mr. McKeaveney to deduct whatever he could from Ms. Altman's vacation account.

[53] According to Mr. McKeaveney, Steve's paid Ms. Altman for 1,505.5 hours between December 2007 and October 2008. She worked 573.5 hours during that time. Steve's paid Ms. Altman for 932 hours or for approximately 23 weeks that she did not work.

[54] The issue is whether Steve's was entitled to deduct money from Ms. Altman's vacation account to pay her salary while she was off work due to her illness.

[55] The analysis must begin with the Act. The definition of wages set out in s. 1 of the Act includes "any payment required to be made by an employer to an employee under this Act." Vacation pay is a payment that is required to be made to an employee pursuant to s. 35.2 of the Act. Vacation pay is therefore wages: *Halabi v. Becker Milk Co.,*[9] and is subject to the restrictions set out in s. 13 of the Act.[10]

[56] In *Grapple Marketing Inc.,*[11] the vice-chair of the Ontario Labour Relations Board dealt with the withholding of vacation pay this way:

> [9] The purpose behind s. 13 of the Act is clear: it is to prohibit an employer from using its power as the holder of the employee's wages to get its way with respect to monetary or other disputes between it and the employee. This ensures that except, in unusual circumstances, an employer is not in a better position than anyone else who might have a claim against its employee. This is an especially important point where the wages at issue are vacation pay which is subject to a statutory trust (see s. 40(1)).
>
> [17] […] [T]he Act is designed to protect employees against the very thing that occurred here: an employer who holds back money from wages that it believes it is owed money from the employee. Moreover, nothing in this decision prevents the employer from obtaining the money in other ways.[12]

[57] Similarly, in this case, Steve's is not entitled to withhold Ms. Altman's vacation account. If Steve's believed that Ms. Altman owed them salary, it could have cross-claimed or brought an action to recover it. As the details of the amount due Ms. Altman from her vacation account are not before me, I direct that the amount of vacation pay due Ms. Altman be determined at a reference to a master, pursuant to rule 54.02(1)(c) of the *Rules of Civil Procedure*.

Frustration

[58] Steve's submits that Ms. Altman's employment contract was frustrated due to her illness. Steve's bears the onus of establishing that the employment contract was frustrated.

[59] In 1904, in the case of *Marks v. Dartmouth Ferry Commission,*[13] the Supreme Court of Canada first articulated the principle that whether the termination of employment is justified depends on whether the employee's disability is temporary or permanent. In a subsequent decision the term 'permanent' has been used to describe an illness that would "put an end, in [the] business sense, to their business engagement" and thus "frustrate the object of that engagement."[14]

[60] To determine whether an illness should be considered temporary or permanent, many courts have relied on guidelines laid out in *Marshall v. Harland & Wolff Ltd.*[15] In that case, Sir John Donaldson held that the dismissal of an employee who was absent for 18 months during his twenty-third year of employment was wrongful. At pages 718-719, he said the following:

> The tribunal must ask itself: was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?

[61] He then laid out a number of matters to be taken into account in determining whether the illness should be considered temporary or permanent. These matters include the terms of the contract, how long the employment was likely to last in the absence of illness, the nature of the employment, the nature of the illness or injury and how long it has lasted, the prospects of recovery, and the period of past employment. These matters are obviously useful considerations, although they may not be exhaustive and any one matter is not necessarily determinative. Each case must be decided on its own facts.

[62] Some cases have narrowed the list of relevant matters for consideration to this:

> To determine if a contract has been frustrated, regard must be had to the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed.[16]

[63] Steve's argues that it terminated Ms. Altman's employment because her illness was permanent in the sense that she was no longer able to perform her duties at work. It is useful to consider a chronological summary of events, which is set out below.

October 2, 1978	Ms. Altman began working for Steve's
December 2007	Ms. Altman is diagnosed with lung cancer
February 2008	Ms. Altman has surgery
April 2008	Ms. Altman undergoes radiation and chemotherapy
September 17, 2008	Ms. Altman's cancer treatments are completed
October 15, 2008	Ms. Altman receives letter from Kaufman Larameé by bailiff warning her that she will be terminated if she does not work full time hours
October 16, 2008	**Last day Ms. Altman worked at Steve's**
October 16, 2008	Dr. Brade's letter to Steve's in support of three-month medical leave for Ms. Altman
October 17, 2008	Ms. Altman faxes Steve's asking for necessary forms to apply for medical disability
October 21, 2008	Ms. Altman applies for Employment Insurance
December 1, 2008	Letter from Kaufman Laramée to Ms. Altman's lawyer enclosing her Record of Employment and disability claim form
December 16, 2008	Ms. Altman submits disability claim form to Standard Life

December 18, 2008	Employment insurance benefits approved for Ms. Altman effective October 19, 2008
January 9, 2009	Dr. Brade's second letter to Steve's in support of further three-month medical leave for Ms. Altman
January 18, 2009	Ms. Altman faxes Steve's confirming she will take further three-month medical leave and asking for completed Employer's Form to submit to Standard Life
March 6, 2009	Dr. Brade completes "Physician's Statement" portion of disability claim form
April 1, 2009	Ms. Altman faxes Steve's indicating she will return to work April 8, 2009
April 6, 2009	Ms. Altman faxes Steve's that she cannot return to work April 8, 2009 because of a compression fracture in her back. She needs two more weeks and will return to work on April 20, 2009.
April 7, 2009	**Date of letter sent by bailiff to Ms. Altman from Kaufman Larameé terminating her employment**
September 2009	Ms. Altman diagnosed with bone metastases
Between Sept 18 – Dec 14, 2009	Sometime between these two dates, Steve's submits Employer's Form to Standard Life
October 2009	Ms. Altman diagnosed with brain metastases
December 14, 2009	Ms. Altman approved for disability payments
May 6, 2010	Dr. Brade completes "Physician's supplementary statement" for Standard Life indicating that Ms. Altman cannot work
August 27, 2010	Dr. Brade completes medical report in support of Ms. Altman's application for CPP disability

[64] Steve's submits that on April 7, 2009, Ms. Altman was permanently disabled and unable to perform the functions of her job. Steve's points to the following facts in support of that argument:

a. Ms. Altman had been unable to work full-time hours between February and October 2008 because of her surgery and cancer treatments.

b. Dr. Brade, Ms. Altman's oncologist, had written two letters to Steve's recommending two medical leaves for Ms. Altman, each of three months duration.

c. Following Ms. Altman's letter of April 1, 2009 indicating she would be returning to work on April 8, 2009, she had to extend the date of her return to work two further weeks until April 20, 2009 because she had suffered a compression fracture in her back.

d. Ms. Altman applied for long-term disability benefits on December 18, 2008.

e. On December 14, 2009 Ms. Altman's application for long-term disability benefits was approved.

f. On May 6, 2010 Dr. Brade completed a statement to Ms. Altman's insurer indicating that she could not work.

g. On August 27, 2010 Dr. Brade completed a report in support of Ms. Altman's application for CPP disability.

[65] In my view, Ms. Altman's disability must be assessed at the time of her dismissal on April 7, 2009. Before reviewing the jurisprudence on this issue, I will set out the evidence regarding Ms. Altman's ability to fulfill her job functions on April 7, 2009.

[66] As store manager, Ms. Altman was responsible for supervising employees, including hiring and firing staff. She testified that she was not required to lift things at work, nor was she required to be on her feet all day. She did paperwork in the office. Michael Kirman testified that she was responsible for ensuring her departments were staffed, for occasional meetings with sales representatives, for walking the floor to ensure customers were being attended to, and generally being a set of eyes to make sure the business was running properly.

[67] Ms. Altman shared these responsibilities with another manager, Gerry Markman.

[68] After taking a month off to recover from surgery, Ms. Altman worked reduced hours. She missed time from work to undergo chemotherapy and radiation but went to work as much as she could. Everyone at Steve's, including Michael Kirman and Steven Kirman, knew about Ms. Altman's illness and the treatment she was undergoing. They were supportive of her.

[69] In September 2008, Michael Kirman met with the managers of the Toronto store, including Ms. Altman, to review a schedule. Ms. Altman's name was not on the schedule. She asked Michael why it was not. He told her that it was because she was working reduced hours, and that when she was better, they could discuss adding her to the permanent schedule. No one from Steve's told her that she was remiss in her duties while at work. No one from Steve's said anything negative to her about the amount of time she was working. She was not given any direction about her hours nor was she told that her job was at risk. At one point, Steve Kirman called Ms. Altman and suggested that she take advantage of the disability insurance available to Steve's employees. Ms. Altman replied that she wanted to work.

[70] She first learned of Steve's dissatisfaction with her work arrangements when she received a letter from Kaufman Larameé by bailiff on October 15, 2008. That letter, the contents of which are set out earlier in these reasons, does not suggest that Ms. Altman was not performing her duties properly while at work. Its complaint is that she was not working full-time hours.

[71] Dr. Madeline Li and Dr. Anthony Brade testified about Ms. Altman's ability to work. Both doctors were treating Ms. Altman at the relevant time. Dr. Li is a psychiatrist who specializes in the treatment of cancer patients, particularly with respect to the lifestyle and quality of life implications of being diagnosed with cancer. Dr. Brade is Ms. Altman's radiation oncologist. Both doctors stated categorically that on April 7, 2009, Ms. Altman was not permanently disabled and unable to work.

[72] Dr. Li testified that it was important to Ms. Altman to continue to work throughout her cancer treatment because it made her feel like a functioning person contributing to her

workplace. Dr. Li first met Ms. Altman on November 17, 2008 and continues to see her for supportive counselling every few months. In Dr. Li's opinion, Ms. Altman was able to work on April 7, 2009. Dr. Li testified that in formulating her opinion about Ms. Altman's ability to work, she had access to Ms. Altman's entire clinical file, which included notes and reports from other physicians treating Ms. Altman. She relied on a report written by Ms. Altman's thoracic surgeon, Dr. Keshavjee, on April 3, 2009, which is marked as Exhibit #4. In this report, Dr. Keshavjee wrote that he had encouraged Ms. Altman to return to work. In Dr. Li's opinion, there was no physical or psychological reason preventing Ms. Altman from returning to work in April 2009.

[73] Dr. Brade testified that he informed Steve's by letter dated October 16, 2008 that he had recommended to Ms. Altman that she take a leave from work for three months. He routinely recommends to patients undergoing cancer treatment that they take time off from work. According to Dr. Brade's letter, fatigue is a common side effect of the trimodality therapy (surgery, chemotherapy and radiation) Ms. Altman had undergone. Ms. Altman was suffering from fatigue, dyspnea and dysphagia. In the October 16, 2008 letter, Dr. Brade did not address Ms. Altman's ability to work. He indicated he would re-evaluate her early in the New Year.

[74] He reassessed Ms. Altman in January 2009, and on January 9, 2009 informed Steve's by letter that he recommended a further three-month leave. That letter did not address Ms. Altman's ability to work either.

[75] The compression fractures Ms. Altman developed in her back in April 2009 were not a significant impediment to Ms. Altman's ability to work, according to Dr. Brade. Ms. Altman was prescribed medication for back pain.

[76] Dr. Brade testified that he has never been of the opinion that Ms. Altman was unable to work. He never told Ms. Altman or Steve's that she was not able to work. Even in December 2010, when the cancer had spread to Ms. Altman's brain and bones, Dr. Brade was of the view that she could work with reduced hours or modified duties. She could not be on her feet for eight hours and she would have to remain seated most of the time, but she was able to work.

[77] Ms. Altman testified that at the end of the second three-month leave, she felt well enough to return to work full-time. She wrote Steve's on April 1, 2009 indicating that she would be returning to work on April 8, 2009. She heard nothing from Steve's in response to her letter until a bailiff delivered another letter from Kaufman Larameé to her on April 7, 2009 informing her that Steve's was not obliged to reinstate her.

[78] No one from the management of Steve's has spoken to Ms. Altman since the day she started her medical leave on October 16, 2008. Michael Kirman testified that he has not spoken to Ms. Altman since October 16, 2008. Ms. Altman testified that she has not spoken to Steve Kirman either.

[79] On April 7, 2009 Steve's had no information about the state of Ms. Altman's health or ability to work other than the letter from Ms. Altman saying she was returning to work.

[80] Steve's submits that the fact that Ms. Altman applied for long-term disability in December 2008 is evidence that Ms. Altman was unable to work. The Group Insurance Policy for employees of Steve's defines disability as follows:

> A state of complete and continuous incapacity, resulting from illness or accidental injury, which wholly prevents you from performing:
>
> a. each and every function of your regular employment during the elimination period and during the twenty-four months immediately following, without regard to the availability of such occupation; and
>
> b. afterwards, any remunerated function or work for which you are reasonably fitted by training, education or experience.

[81] Steve's submits that Ms. Altman's application for long-term disability in December 2008 is evidence that she considered herself to be disabled according to this definition, which in turn is evidence that her illness was permanent and prevented her from performing the functions of her job. I disagree with this analysis. Ms. Altman testified that she believed she was entitled to disability benefits if she was unable to perform each and every function of her job. She believed she was unable to fulfill each and every function of her regular employment because she could not work full time. In addition, she applied for benefits in December 2008 when she was still recovering from her cancer treatments.

[82] Furthermore, despite the wording of the policy, there is no evidence about how Standard Life applied the definition. The evidence is that Standard Life pays disability benefits in cases where the insured can potentially return to work. In a letter dated December 14, 2009, Standard Life informed Ms. Altman that it might periodically ask for medical reports to evaluate her potential return to work.[17] Thus, it is apparent that Standard Life would pay disability benefits even in cases where the disability is not permanent.

[83] In further support of its submission that Ms. Altman was unable to work at the time she was terminated, Steve's relies on medical reports submitted by Dr. Brade to Ms. Altman's insurer on May 6, 2010 in which he opines that Ms. Altman is unable to return to work and is not suitable for trial employment. Dr. Brade testified that, in May 2010, he did not think Ms. Altman would survive more than six months, and for that reason he did not think she would be able to return to work.

[84] Similarly, on August 27, 2010, Dr. Brade submitted a medical report to Human Resources and Skills Development Canada in support of Ms. Altman's application for CPP disability benefits in which he describes Ms. Altman as suffering from significant fatigue due to disease and ongoing treatment.

[85] Both of these reports were written more than one year after Steve's terminated Ms. Altman's employment. They were written after Ms. Altman's cancer had spread to her brain and her bones. Reliance on them as evidence of permanent disability raises the question of whether an employer can rely on post-termination evidence to establish permanent disability and inability to work.

[86] A number of decisions in British Columbia[18] have held that post-termination evidence of disability is relevant to determining the permanence of an employee's disability. This approach is based on well-settled law dealing with the dismissal of an employee for good cause. The law was articulated by the Ontario Court of Appeal in *McIntyre v. Hockin*[19]as follows:

> It is now settled law that if a good cause of dismissal really existed, it is immaterial that at the time of dismissal the master did not act or rely upon it, or even did not know of its existence, or that he acted upon some other cause in itself insufficient. The main question always is, were there at the time of the dismissal facts sufficient in law to warrant it...

[87] I conclude that this approach is inappropriate for determining the permanence of an employee's disability for the reasons set out in *Wilmot v. Ulnooweg Development Group Inc.*:[20]

> [44] [...] ... First, the loss of one's job could contribute to the degree of disability suffered by the time of trial that might not have existed but for the loss of employment … The *MacLellan* position could allow an employer to take advantage of a post-termination condition that might have been affected by the effects of the termination itself …
>
> Second, the employer would be taking advantage of an employee's condition after the employment relationship formally ended (by the employer's termination) …
>
> Third … this analogy is logically flawed. The doctrine of "after acquired knowledge" in just cause cases allows the employer to use the conduct and actions of an employee *before* termination to subsequently establish just cause. That evidence has crystallized as of the date of termination. To the contrary, the post-termination condition of employees takes into account their condition *after* the termination. This offers no guarantee that the condition could change for any variety of reasons, some of which might or might not have been operating at the time of termination.

[88] I adopt the approach set out in *Marshall v. Harland & Wolff Ltd.*,[21] which requires the court to examine the employee's incapacity before the purported dismissal. This approach is consistent with the approach taken by the Supreme Court of Canada in *M.U. A., local 6869 c. Cie minière Québec Cartier*[22] in which L'Heureux-Dubé J. wrote as follows:

> [13] This brings me to the question […] whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review **at the time that it was implemented**. [emphasis added]

[89] This approach has been followed in *Lippa v. Can-Cell Industries Inc.*,[23] *Wilmot v. Ulnooweg Development Group Inc.*,[24] and *White v. F. W. Woolworth Co.*[25] To paraphrase the words of Saunders J.A. in *Wilmot v. Ulnooweg Development Group Inc.*, "In other words, the question to be decided was whether the contract was frustrated when in [April 2009 Steve's] decided to fire [Ms. Altman]. Evidence as to whether she was still disabled at the time of trial, i.e., 'how she turned out' was not relevant to answering that question."[26]

[90] I turn now to the guidelines set out in *Marshall v. Harland & Wolff Ltd.*,[27] highlighted in italics below, as they relate to the facts of this case.

[91] *The terms of the contract, including the provisions as to sickness pay – The whole basis of weekly employment may be destroyed more quickly than that of monthly employment and that in turn more quickly than annual employment.* Steve's employed Ms. Altman on the basis of an annual contract. She was paid on the basis of an annual salary. Steve's did not pay her while she was on medical leave.

[92] *How long the employment was likely to last in the absence of sickness – The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.* Ms. Altman expected to retire from Steve's. The employment relationship was expected to be lifelong.

[93] *The nature of the employment – Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.* Ms. Altman was one of three managers who performed the same or similar duties within the Toronto store. Steve's did not replace her with another employee during her absence. Other store managers took on her duties while she was away.

[94] *The nature of the illness or injury and how long it has already continued and the prospects of recovery - The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.* At the date of termination on April 7, 2009, Ms. Altman had been on medical leave for six months. For the eight months prior to that she had been working reduced hours.

[95] *The period of past employment - A relationship which is of long standing is not so easily destroyed as one which has but a short history. This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens. The legal basis is that over a long period of service the parties must be assumed to have contemplated a longer period or periods of sickness than over a shorter period.* Ms. Altman had worked for Steve's for more than 30 years.

[96] I conclude that Steve's Music has not established that on April 7, 2009 Ms. Altman's illness was of such a nature that she was unable to perform the duties of her job. I base this finding on the following facts:

a. The uncontradicted evidence of Drs. Brade and Li, Ms. Altman's treating physicians, that she was able to work on April 7, 2009.

b. Prior to her medical leave on October 17, 2008, Ms. Altman had been performing the duties of her job at reduced hours. Steve's never expressed dissatisfaction with the quality of her work, or advised her that she was not performing her duties as required. Steve's complaint, as detailed in the Kaufman Larameé letter Ms. Altman received on October 15, was with the number of hours she was working, not with her ability to do the job.

c. On April 1, 2009 Ms. Altman wrote Steve's indicating that she would be returning to work on April 8, 2009. She did not write that she was unable to work full time or that she was unable to perform any of her duties. The letter from Kaufman Larameé terminating her employment was written in response to that letter.

d. Steve's terminated Ms. Altman without inquiring about her ability to perform her job. No one in the management of Steve's spoke with Ms. Altman between October 16, 2008 (the last day she worked) and April 7, 2009. Both letters to Steve's from Dr. Brade invited Steve's to contact him if further information was required. No one from Steve's contacted Dr. Brade.

[97] I find that the defence of frustration fails.

Notice

[98] In determining the period of reasonable notice in this case, I am required to weigh and balance a number of factors.[28] Although not an exhaustive list, some of the factors to consider are set out in *Bardal v. Globe and Mail*:[29]

a. the character of Ms. Altman's employment;

b. the length of her service;

c. her age; and

d. the availability of similar employment having regard to Ms. Altman's experience, training and qualifications.

[99] Ms. Altman was a manager of a retail store that sold musical instruments. She knew the business well, having started there in 1978 working at the front counter, selling strings, guitar picks and other accessories. She moved to doing the daily accounting and then became office manager. In 1998, she became a store manager. She was responsible for hiring and firing employees. She was well known in the Canadian music industry by sales representatives and musicians. She was a member of an advisory board of the Music Industries Association of Canada. Ms. Altman considered her position a prestigious one.

[100] Ms. Altman worked for Steve's for 30 years. She was nearly 58 years old when Steve's terminated her employment. She is now 59 years old.

[101] Quite apart from Ms. Altman's current state of health, the prospect of her finding employment that would provide her with the opportunity to be involved and recognized at a national level in an industry is unlikely. This aspect of her employment at Steve's was significant to Ms. Altman, and is relevant in assessing similar employment opportunities.[30]

[102] Weighing all of these factors, I find that a period of reasonable notice is 22 months, inclusive of her eight weeks statutory entitlement.

Disability Payments

[103] Steve's submits that the disability payments received by Ms. Altman during the notice period should be deducted from any award of damages.

[104] Ms. Altman participated in a benefits plan while employed by Steve's. The plan included health and dental benefits, life insurance, and long-term disability benefits. Both Steve's and Ms. Altman paid the premiums. There is no evidence about the precise contribution Steve's made to the premiums for the long-term disability benefits. Ms. Altman receives the benefits tax-free. Ms. Altman's contribution to the premium for the long-term disability insurance was deducted from her paycheques.

[105] The long-term disability insurance carrier was Standard Life. Standard Life paid the benefits to Ms. Altman.

[106] Steve's did not pay Ms. Altman while she was on medical leave. On December 18, 2008 she received sickness employment insurance benefits from the Government of Canada retroactive to October 19, 2008. These benefits lasted 15 weeks.

[107] After a very lengthy delay, Ms. Altman began receiving disability payments from Standard Life in December 2009. The payments were retroactive to February 2009.

[108] The question of whether disability insurance benefits are deductible from an award of damages "turns on the terms of the employment contract and the intention of the parties."[31] In the case of *Sylvester v. British Columbia*,[32] an employee of the BC government was terminated while receiving disability benefits. The employer funded the costs of the disability plan, and paid the disability benefits. In those circumstances, Major J. found that it could not be inferred that the parties would agree that the employee should retain disability benefit payments in addition to damages for wrongful dismissal.

[109] This case is distinguishable. Ms. Altman paid premiums for the long-term disability insurance and the benefits were paid by Standard Life, not Steve's. The circumstances of this case are more akin to those in *McNamara v. Alexander Centre Industries Ltd.*,[33] *Sills v. Children's Aid Society of the City of Belleville*,[34] and *Piresferreira v. Ayotte*,[35] in which the courts held that disability benefits were not deductible from a damages award.

[110] The words of Simmons J.A. in *Sills* are apt:

> [45] [...] I consider it reasonable to assume that an employee would not willingly negotiate and pay for a benefit that would allow her employer to avoid responsibility for a wrongful act. I consider it reasonable to infer that parties would agree that an employee should retain disability benefits in addition to damages for wrongful dismissal where the employee has effectively paid for the benefits in question.
>
> [46] The same reasoning applies to the suggestion in *Sylvester* that a disabled employee who receives adequate notice should not be treated differently than a disabled employee who is wrongfully dismissed – an employer should not be

> relieved of the obligation to pay damages for a wrongful act because of a benefit plan provided by the employee. Moreover, the concern expressed in *Sylvester*, that disabled employees who are wrongfully dismissed be treated the same as working employees who are wrongfully dismissed, simply does not arise where the employee has paid for the plan that provides a disability income.

[111] In this case, there is no written employment contract, and no written provision precluding recovery of both damages for wrongful dismissal and disability benefit payments. It is reasonable to infer from all the circumstances that Ms. Altman should retain the disability benefits in addition to the damages. The relevant circumstances are that, a) Ms. Altman paid part, if not all, of the premiums for the long term disability benefits, b) Standard Life, not Steve's, paid the benefits to Ms. Altman, c) Ms. Altman received no disability payment until December 2009 – more than one year from the date she took her medical leave – due to Steve's failure to complete the policyholder's portion of the claim form, and d) Steve's terminated Ms. Altman while on medical leave, but before she had received any disability payment.

[112] Following the reasoning in *Piresferreira, Sills* and *McNamara*, I find that the long-term disability benefits Ms. Altman received are not deductible from the damages I have awarded.

Mitigation

[113] Once terminated by Steve's, Ms. Altman had a duty to mitigate her damages. Steve's submits that mitigation is not an issue because Ms. Altman was not fit to work. Alternatively, if she was capable of working, and was wrongfully dismissed, Steve's submits she should have looked for work.

[114] Ms. Altman testified that following her termination on April 7, 2009 she looked for work. She went to two employment centres and filed for a job search, searched on line for jobs, and looked in newspapers, particularly in the section dealing with management positions. She was unable to find anything suitable. She testified that there was very little available for someone in her position. I find that the efforts Ms. Altman made in mitigation were reasonable.

[115] Steve's did not plead failure to mitigate. In any event, Steve's bears the onus of demonstrating that Ms. Altman failed to make reasonable efforts to find work, and that she could have found an alternative position had she taken reasonable steps.[36] I find that Steve's has not met that onus.

Moral Damages

[116] Ms. Altman claims damages resulting from the failure of Steve's to act in good faith in the manner of her termination.

[117] The Supreme Court of Canada's decision in *Honda Canada Inc. v. Keays*,[37] confirmed its earlier ruling in *Wallace v. United Grain Growers Ltd.*[38] that damages resulting from the manner of dismissal will be available if the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."[39] The normal distress and hurt feelings resulting from dismissal from employment

are not compensable.[40] The award of damages for mental distress caused by the manner of termination must reflect the actual damage caused and is meant to be compensatory in nature.

[118] In my view, Ms. Altman is entitled to moral damages. What damage did she suffer as a result of the actions of Steve's?

[119] Dr. Madeline Li testified about the impact on Ms. Altman of the letters she received from Steve's law firm, Kaufman Larameé. Dr. Li is one of Ms. Altman's treating physicians. She described herself as a cancer psychiatrist. She specializes in treating the psychiatric complications that are seen in cancer patients. She first met Ms. Altman on November 17, 2008, and continues to treat her.

[120] Dr. Li met Ms. Altman after she had undergone surgery, chemotherapy and radiation therapy. Dr. Brade referred Ms. Altman to Dr. Li as Ms. Altman was suffering from psychological distress. Dr. Li diagnosed her as suffering from a major depressive episode of moderate severity. In Dr. Li's opinion, this illness was precipitated by Ms. Altman's receipt by bailiff of the October 7, 2008 letter from Kaufman Larameé informing her that she will be terminated if she does not work full-time hours. Dr. Li testified that this letter was more traumatic for Ms. Altman than being diagnosed with cancer or being told that her cancer could not be cured.

[121] According to Dr. Li, working for Steve's was very important to Ms. Altman, particularly during her cancer treatment. It allowed Ms. Altman to continue to see herself as a functioning person contributing to her work place. Her relationship with Steve's was such that she not only depended on it for her living but also for her sense of identity and purpose in life. The accommodation Steve's had given her throughout her cancer treatment led her to have no expectation of receiving the October letter by bailiff. Receipt of the letter forced Ms. Altman to reassess how she sees herself, and her trust in the world. Dr. Li analogized Ms. Altman's reaction to this letter to the situation in which a loyal and defenceless dog is unpredictably whipped and abandoned to die by its owner.

[122] Dr. Li testified that Ms. Altman's depression required treatment because the presence of depression in cancer patients is very strongly co-related with poor survival, poor response to treatment, and higher mortality. Ms. Altman's depression remitted only following a four-week course of anti-depressant medication.

[123] Although Ms. Altman's depression remitted, her psychological distress has not abated, according to Dr. Li. Ms. Altman continues to be distressed over the conflicts she has had with her employer, which is activating her hormonal stress system and putting her health at further risk.

[124] Steve's actions must be viewed in the context of Ms. Altman's age, length of service, state of health, and relationship with Steve's Music. After 30 years of service, and having just completed rigorous cancer treatment, Steve's counsel, Kaufman Larameé, sent a letter by bailiff to Ms. Altman (the contents of which are set out at para. 10 of these reasons) that misstated the arrangement she had made with her employer about her work hours during her cancer treatments.

[125] This was followed on April 7, 2009 with a similar letter delivered by bailiff terminating her employment. The April 2009 letter states that Steve's has no obligation to reinstate Ms. Altman because her position with Steve's has been abolished and she has applied for long-term disability. The language of this letter indicates that, as of April 7, 2009, Steve's already considered Ms. Altman to be terminated.

[126] As counsel for Steve's indicated, the April 2009 letter of termination was insensitive and inappropriate, and does not accord with the way the law requires employers to treat employees. However, he submits, the letter is an aberration, and is inconsistent with the way Steve's treated Ms. Altman throughout her illness.

[127] Ms. Altman testified that she was shocked upon receiving news that her position had been abolished. At first she was unsure whether it meant she was terminated or that her job was being changed. Her termination was totally unexpected and was devastating for her.

[128] Michael Kirman testified that he did not instruct the sending of the October 2008 letter. Common sense dictates that if the October 2008 letter was not in keeping with the way Steve's intended to treat Ms. Altman, after employing her for 30 years, Michael Kirman would have contacted Ms. Altman promptly to apologize or explain. Instead, Michael Kirman has never spoken to Ms. Altman about it and in fact, has not spoken to Ms. Altman at all since her last day of work at Steve's on October 16, 2008. In addition, a letter written in the same tone and delivered to Ms. Altman in the same way was sent by Steve's counsel six months later. Although one aberrant letter may be possible, I conclude that two are not.

[129] The manner of communicating termination has been held to justify damages for mental distress. In *Bohemier v. Storwal International Inc.*[41] the Ontario Court of Appeal upheld an award of damages for mental distress in circumstances where an employee of 35 years was terminated by means of a cold and perfunctory letter delivered to his house by taxi on a Friday evening.

[130] Similarly, an employer's harsh treatment of an employee known to be in difficult circumstances has been held to be the proper subject of damages for mental distress. In *Rae v. Attrell Hyundai Subaru*[42] the employer sent notice of dismissal to an employee of four years by courier two weeks prior to the birth of her child. The Court of Appeal upheld the trial judge's finding that this inexcusable conduct on the part of the employer merited a two-month increase in notice.

[131] Steve's treatment of Ms. Altman was callous and insensitive. She was a 30-year employee who had been treated like family, and who worked for Steve's as if she were a member of the family. She deserved to be treated better than twice having a bailiff deliver her a letter replete with mistruths from Steve's lawyers – especially when Steve's knew she was recovering from cancer treatment. No one in the management of Steve's had the decency or courtesy to speak to her personally to express their dissatisfaction with the work arrangement to which they had previously agreed. I conclude that once Steve's decided that Ms. Altman had become more of a liability than an asset to the organization because of her cancer, they abandoned her to be dealt with by their lawyers. These letters devastated Ms. Altman and caused her significant

mental distress to the point of clinical depression. Ms. Altman's mental distress has been long lasting and is ongoing.

[132] I award Ms. Altman damages in the amount of $35,000.00 as compensatory damages as a result of Steve's breach of its duty to deal with Ms. Altman in good faith and with fairness in the manner in which they terminated her employment.

Punitive Damages

[133] Ms. Altman also seeks punitive damages. To succeed, Ms. Altman must establish three things:

1. Steve's conduct was so harsh, vindictive, reprehensible and malicious or so malicious, oppressive and high handed that it offends the court's sense of decency.

2. Steve's committed a separate or independent actionable wrong causing her damage.

3. The compensatory damages are not sufficient to express the court's repugnance at Steve's conduct, and to punish and deter Steve's.[43]

[134] The Supreme Court of Canada in *Honda Canada Inc. v. Keays*[44] set out the circumstances in which punitive damages may be awarded. At paragraph 62, Bastarache J. said, "punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own."

[135] I am required by the *Honda* decision to focus on the misconduct of Steve's Music, rather than on the loss suffered by Ms. Altman in determining whether to award punitive damages.

[136] In my view, the following conduct on the part of Steve's Music calls for an award of punitive damages:

a. Steve's refused to pay Ms. Altman the statutory minimum termination pay set out in the Act until Ms. Altman brought an application for summary judgment in December 2010, 20 months after her employment was terminated. Steve's was ordered to pay the statutory minimum by Conway J.

b. Steve's has improperly withheld wages Ms. Altman earned, contrary to the Act.

c. Steve's failed to provide Ms. Altman an accounting of the amount held for her in the deferred profit sharing plan, contrary to the order made by Conway J. on December 29, 2010.

d. Steve's used Ms. Altman's vacation bank to reimburse itself for time Ms. Altman was absent. This factor is particularly important given that at all times, Steve's led Ms. Altman to believe that she was being paid her full salary and never informed her it would use the time she had accrued in her vacation bank. This was done in the face of section 40 of the Act, which deems employers to hold all vacation pay accruing to employees in trust for the employees.

e. Despite numerous attempts by Ms. Altman, and others on her behalf, to have Steve's complete the Policyholder's Statement in the Standard Life claim form, Steve's failed to do so until more than one year after Ms. Altman went on medical leave, and more than six months after it terminated Ms. Altman's employment. Ms. Altman was unable to receive the disability benefits she had paid for because of Steve's failure to complete this form. She ultimately received benefits in December 2009 retroactively.

f. Ms. Altman was required to retain counsel to obtain her Record of Employment that would permit her to receive Employment Insurance Benefits. Her counsel received the Record of Employment on December 1, 2008. Michael Kirman's only explanation for this delay was that the Record of Employment must have been lost in the mail. Steve's failure to provide Ms. Altman with this document meant that Ms. Altman had no income whatsoever between October 18 and December 18, 2008.

[137] Steve's violations of the *Employment Standards Act* amount to an independent actionable wrong, separate from its breach of the employment contract in not providing Ms. Altman reasonable notice of termination.

[138] Steve's conduct in relation to Ms. Altman is consistent with the description provided by its counsel in his submissions – "Steve's Music Store has been for many years Steve's. He's the guiding light. He's the boss." That is the way the business is run. Michael Kirman testified that Steve's has no employment policy manual. He guessed that employees learn of Steve's employment policies through their managers, who know them based on the tradition of how Steve's has conducted business over the years. I find that in this case Ms. Altman was the victim of *ad hoc* decisions made by the management of Steve's. When she first became ill, Steve Kirman decided that she would be paid her salary. When her illness resulted in too many absences, Steve decided to withdraw her vacation pay without telling her. When she became more of a liability to the business than an asset, Steve's decided to terminate her employment and withhold her wages, termination pay, and other money owed Ms. Altman to make up for her missed work time. As the April 7, 2009 letter to Ms. Altman from Kaufman Laramée said,

> As for your reference to so called outstanding issues relating to your remuneration and unpaid benefits, once again, the correspondence addressed to you to date is clear and unequivocal in that Steve's Music was fully entitled to offset and deduct from your remuneration or for that matter **any other sums due and owing to you**, for your absenteeism, late arrivals and early departures. [emphasis added]
>
> Consequently, be advised that according to Steve's Music's records, you are owed nothing further. Consequently, be advised that any attempt to claim any sums whatsoever from your former employer, will be vigorously contested.

[139] Steve's conduct must be viewed in the totality of Ms. Altman's circumstances. In October 2008, Ms. Altman had just completed very intensive cancer treatment. Steve's did not pay her during her medical leave, which began on October 17, 2008. In fact, Steve's did not pay her for the hours she had worked that week. Ms. Altman had no source of income. Steve's failure to honour its statutory obligations to pay her termination pay, to provide her with a Record of Employment to allow her to obtain Employment Insurance benefits, to comply with an order

made by Conway J. to provide Ms. Altman with an accounting of her share of the deferred profit sharing plan, together with the other misconduct listed in paragraph 136 is reprehensible and high handed conduct that is deserving of this court's denunciation.

[140] Punitive damages must serve a rational purpose. They must be rationally required to serve as a deterrent. "This rationality test applies to the question of whether the award should be made at all and to the question of the amount:" *Whiten v. Pilot Insurance Co.*[45] In *Whiten*, Binnie J. held that proportionality is the "key to the permissible quantum of punitive damages."[46] To determine proportionality, Binnie J. listed a number of factors to consider, including, the blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff, the harm directed specifically at the plaintiff and the need for deterrence.[47]

[141] Relevant to the blameworthiness of Steve's conduct is the fact that it persisted until Ms. Altman was forced to retain counsel to bring an application before the court to force Steve's to pay her statutory termination pay.

[142] I need not repeat the details of Ms. Altman's circumstances, including her health and lack of income, to indicate that Ms. Altman was vulnerable.

[143] Steve's conduct was directed specifically at Ms. Altman.

[144] The conduct on the part of Steve's Music that I have outlined above as worthy of punitive damages is different from the conduct that serves as the foundation for the award of damages for mental distress. The compensatory damages awarded Ms. Altman for her mental distress are not sufficient to avoid a repetition of this conduct or to express the court's repugnance at the conduct. In the circumstances, I award Ms. Altman $20,000.00 in punitive damages.

Disposition

[145] Pursuant to the agreement of the parties, I order that Steve's pay Ms. Altman $4,725.00 in commission.

[146] In this judgment, I have determined that Steve's should also pay Ms. Altman salary for 22 months, including the eight weeks statutory termination pay, $35,000.00 in damages for mental distress and $20,000.00 in punitive damages.

[147] Ms. Altman is also entitled to pre-judgment interest from the date of her claim and post-judgment interest, in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[148] I direct that the following matters be determined at a reference before a master and that the amount determined by the master be paid to Ms. Altman along with pre-judgment interest from the date of her claim:

a. The amount of money owed Ms. Altman from the deferred profit sharing plan.

b. The amount of salary earned by Ms. Altman between July 31, 2008 and October 17, 2008 that has not been paid.

c. The amount of two bonus payments to Ms. Altman that should have been paid to her for the years 2006 and 2007.

d. The amount of vacation pay in Ms. Altman's vacation bank that Mr. McKeaveney transferred out to pay for Ms. Altman's absences.

Costs

[149] If the parties are unable to agree on costs, Ms. Altman shall provide brief written costs submissions not to exceed three pages (excluding the bill of costs) of double-spaced type to me within 14 days of the release of these reasons, and Steve's shall provide brief responding costs submissions not to exceed three pages of double-spaced type within 10 days thereafter.

Corrick J.

Released: March 8, 2011

[1] [1952] 2 D.L.R. 354, 1951 CarswellBC 133.
[2] [2004] OLRB Rep. March/April 384.
[3] [1998] O.J. No. 2248.
[4] See *Dao v. Brick Warehouse LP*, 2005 CanLII 37984 (On L.R.B.); *Carroll v. Stonhard Ltd.* (2003), 53 O.R. (3d) 175 (S.C.J.).
[5] R.R.O. 1990, Reg. 194 (the "*Rules of Civil Procedure*").
[6] 2005 CarswellOnt 5266, 2005 C.L.L.C. 210-045, 51 C.C.E.L. (3d) 112 (Sup Ct.).
[7] See also *O.N.A. v. Peterborough Civic Hospital*, 1982 CarswellOnt 1339, 132 D.L.R. (3d) 415.
[8] Produced at Tab D5 of Exhibit #2.
[9] 1998 CarswellOnt 2951, 39 O.R. (3d) 153, 38 C.C.E.L. (2d) 89 (Gen. Div.).
[10] See *MenuPalace.com Corp. v. Saladino*, 2008 CarswellOnt 5544, [2008] O.L.R.B. Rep. 424; *Grapple Marketing Inc. (c.o.b. Kwik Kopy Design and Print Centre*), [2010] O.E.S.A.D. No. 160, [2010] OLRB Rep. March/April 272.
[11] *Supra*.
[12] *Supra*.
[13] 34 S.C.R. 366.
[14] See *Yeager v. R.J. Hasting Agencies Ltd.* (1984), 5 C.C.E.L. 266, [1985] 1 W.W.R. 218 (B.C.S.C.) at 82.
[15] [1972] 1 W. L. R. 899, [1972] 2 All E.R. 715 (NIRC).
[16] *Skopitz v. Intercorp Excelle Foods Inc.*, 1999 CarswellOnt 2050, [1999] O.J. No 1543 (Gen. Div.); *Yeager v. R. J. Hasting Agencies Ltd., supra*; *Lafrenière v. Leduc* (1990), 66 D.L.R. (4th) 577 (Ont. H.C.J.).
[17] Letter at Tab 82 of Exhibit #2.
[18] *MacLellan v. H. B. Contracting Ltd.*, [1990] B.C.J. No. 935 (B.C.S.C.); *Demuynck v. Agentis Information Services Inc.*, [2003] B.C.J. No. 113 (B.C.S.C.).
[19] (1889), 16 O.A.R. 498 at 501.
[20] 2007 NSCA 49, 2007 CarswellNS 183.
[21] *Supra.*
[22] [1995] 2 S.C.R. 1095, 125 D.L.R. (4th) 577.
[23] 2009 ABQB 684, [2009] A.J. No. 1285.
[24] *Supra.*
[25] (1996), 139 Nfld. & P.E.I.R. 324 (Nfld.C.A.).
[26] *Wilmot, supra* at para. 41.
[27] *Supra.*
[28] *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130.
[29] (1960), 24 D. L. R. (2d) 140 (Ont. H.C.J.).
[30] *Love v. Acuity Investment Management Inc., supra* at para. 22.
[31] *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315 at para. 12.
[32] *Supra.*
[33] 2001 CanLII 3871 (Ont. C. A.).
[34] (2001), 53 O. R. (3d) 577 (C. A.)
[35] (2008), 72 C.C.E.L. (3d) 23 (Ont. S.C.J.).
[36] *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324.
[37] [2008] 2 S.C.R. 362.
[38] [1997] 3 S.C.R. 701.
[39] *Wallace, supra* at para. 98.
[40] *Honda, supra* at para. 56.
[41] (1982) 40 O.R. (2d) 264 (H.C.), varied (1983) 44 O.R. (2d) 361, leave to appeal to S.C.C. refused (1984) C.C.E.L. 79 (S.C.C.).
[42] 2005 CarswellOnt 6599 (Ont. C.A.) affirming 2004 CarswellOnt 7357 (Ont. S.C.J.).
[43] *Marshall v. Watson Wyatt & Co.*, [2002] O.J. No. 84 (Ont. C.A.) at paras. 44 and 45.
[44] *Supra.*
[45] [2002] 1 S.C.R. 595.
[46] *Supra* at para. 111.
[47] *Supra* at paras. 112 to 122.